

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----x
4 G.M.M., a minor child by his mother and natural
5 guardian, NIKI HERNANDEZ-ADAMS, and NIKI
6 HERNANDEZ-ADAMS, individually,

7 Plaintiffs,

8 versus

9 13 CV 5059 (JBW)

10 MARK KIMPSON,

11 Defendant.

12 -----x
13 U.S. Courthouse
14 Brooklyn, New York

15 July 9, 2015
16 9:45 a.m.

17 Transcript of Civil Cause for Trial

18 Before: HONORABLE JACK B. WEINSTEIN,
19 District Court Senior Judge
20 (and a jury.)

21 APPEARANCES

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Also Present:
DENISE FELIPE-ADAMS
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Proceedings recorded by mechanical stenography. Transcript
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G.M.M. v. Kimpson

1 (In open court.)

2 THE COURT: Any applications?

3 MR. CANTOR: Judge, I would just like to see the jury
4 instructions, the final copy.5 THE LAW CLERK: They were e-mailed last night to
6 everybody.

7 THE COURT: You have them.

8 MR. CANTOR: I don't have my e-mails.

9 THE LAW CLERK: And hard copies were given last week.

10 THE COURT: Well, we made some changes. Do we have an
11 extra copy?12 THE LAW CLERK: We would have to go and make a copy.
13 You have the final copy, judge. I don't have an additional
14 copy except what's on the computer.15 THE COURT: We will ask June to make another copy, and
16 we will give it to you.17 The only problem your colleague raised was the verdict
18 sheet.

19 THE LAW CLERK: Do you need a copy as well?

20 MR. ARCHIBALD: No. We have our copy.

21 THE COURT: Do we have a jury?

22 THE LAW CLERK: Yes, full jury.

23 THE COURT: Bring in the jury.

24 (Jury enters.)

25 THE COURT: Good morning, everybody.

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1 Do you have a witness, please?

2 MR. ARCHIBALD: Yes, your Honor.

3 THE COURT: Would you swear the witness, please.

4 THE LAW CLERK: Please raise your right hand.

5 CHARLES KINCAID, called as a witness, having been

6 first duly sworn/affirmed, was examined and

7 proceeded to testify as follows:

8 THE LAW CLERK: Please state your name and spell it
9 for the record.

10 THE WITNESS: Charles Kincaid, C-H-A-R-L-E-S
11 K-I-N-C-A-I-D.

12 THE LAW CLERK: Take a seat.

13 THE COURT: Please be seated.

14 MR. ARCHIBALD: May I inquire, your Honor?

15 THE COURT: Please.

16 DIRECT EXAMINATION

17 BY MR. ARCHIBALD:

18 Q Good morning, Dr. Kincaid. How are you?

19 A Good morning. Fine, thank you.

20 Q You were retained by my offices to do an evaluation on a
21 vocational basis for the infant plaintiff in this case, G.M.M.,
22 correct?

23 A That's correct.

24 Q Prior to my office contacting your office sometime in the
25 early spring of this year, had you ever done any work for my

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1 firm?

2 A No, I have not.

3 Q And other than yesterday, when I met you -- when I met you
4 in the hallway, was that the first time we had met?

5 A That's correct.

6 Q But we had spoken on the phone prior to that, correct?

7 A Yes.

8 Q Now, in preparation for the report and evaluation that you
9 did, you reviewed certain documents, correct?

10 A That's right, I did.

11 Q Okay. Did you review a report from plaintiffs' vocational
12 expert, a Dr. Kenneth Reagles?

13 A Yes, I did.

14 Q Did you also review a report from plaintiff's economist, a
15 Dr. Tinari?

16 A Yes, I did.

17 Q Now, before we get into the body of your testimony, I just
18 want you to tell the jury a little bit about your educational
19 background and professional activities.

20 A Yes, I have a bachelor of arts in psychology from the
21 University of Wisconsin, Milwaukee; a certificate in
22 rehabilitation management from DePaul University; a master's
23 degree in of criminal justice administration from the
24 University of Wisconsin, Milwaukee; a Ph.D. in rehabilitation
25 counseling from Syracuse University; and a certificate in life

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1 care planning from Capital University Law School.

2 I have been involved in the field for over 35 years.

3 I started actually in the criminal justice system, working with
4 offenders, developing vocational rehabilitation plans for
5 pretrial offenders, probationers, and parolees; and I have
6 worked also as a private rehabilitation counselor. I have
7 worked with individuals with all types of disabilities.

8 And then an instructor, adjunct instructor and adjunct
9 professor teaching master's level students at Syracuse
10 University and later at William Patterson University,
11 principles and practices of rehabilitation counseling and
12 assistive technology.

13 I was a director of Sister Technology Regional Center
14 at New York City, for United Cerebral Palsy of New York City;
15 and I did that for about four years, where I taught individuals
16 about assistive technology and evaluated them for their needs,
17 both children and adults.

18 Most recently I have owned and operating my own
19 company, Kincaid Vocational Rehabilitative Services, where I
20 provide vocational evaluations, vocational counseling, and
21 assistive technology evaluations.

22 Q Thank you, doctor. In regards to your certificates in
23 life-care planning, when did you receive that?

24 A That was in 2004.

25 Q What does a life-care planner do in terms of evaluating

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1 expenditures that an injured person might require?

2 A Well, the life-care planner would first review medical
3 records, would typically speak with medical providers,
4 determine what the individual's medical needs are going to be
5 in the future; and then they would do costing research to
6 determine, depending on the area the person lives in, what
7 would be a reasonable cost for those services, equipment that
8 the individual is going to need. And that's projected out over
9 their life expectancy, to arrive at a cost for medical care
10 related to an illness or injury.

11 Q Okay. So then you would go look to, as a life-care
12 planner, certain indexes to give you hard and fast0 estimates
13 of what certain things would cost?

14 A Yes. There are national databases that you can access.
15 Sometimes people will also contact providers, companies, for
16 costs as well.

17 Q That's part of the research that you do in formulating your
18 opinions and reports?

19 A That's right.

20 Q Now in regards to your Ph.D., when did you get that? When
21 were you awarded your Ph.D.?

22 A 1997.

23 Q That Ph.D. was in rehabilitation counseling, correct?

24 A That's correct.

25 Q And without that Ph.D., would you be able to consider

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1 yourself or call yourself a rehabilitation or vocational
2 expert?

3 A It's certainly -- it's very helpful, not absolutely
4 necessary, but it's a key ingredient to my knowledge base and
5 understanding of the field.

6 Q Then your MS in criminal justice administration, you got
7 that from the University of Wisconsin, correct?

8 A That's right.

9 Q When did you get that degree?

10 A 1990.

11 Q Then you also have a certificate in rehabilitation
12 management.

13 When did you receive that?

14 A 1987.

15 Q Okay. What's the difference between rehabilitation
16 management and rehabilitation counseling? Is there a
17 difference?

18 A Yes. Management is you are trained to actually develop and
19 manage other people providing services. So it's a training to
20 be a director, supervisor of others providing services.

21 Q Then you have got your BA from the University of Wisconsin.

22 What year did you get that?

23 A 1975.

24 Q Do you hold any professional licensures?

25 A I'm licensed in the State of New Jersey as a rehabilitation

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1 counselor.

2 Q Do you hold any certifications?

3 A Yes. I'm a certified rehabilitation counselor, also a
4 fellow of the American Board of Vocational Experts. I'm a
5 certified life-care planner, and I'm a certified assistive
6 technology professional.

7 Q Now, do you have any academic credentials, such as have you
8 ever taught on a college level?

9 A Yes, I have. When I was at Syracuse University I was an
10 adjunct professor and teaching associate for about five years.
11 And I taught master's level students the principles and
12 practices of rehabilitation counseling as well as assistive
13 technology.

14 Q What about at William Patterson University, did you hold
15 any position there is?

16 A Yes. I was an adjunct professor, and I taught education
17 teachers an introductory class in assistive technology and its
18 application in the classroom, how it can help students with
19 disabilities to improve their learning.

20 Q In regards to coming up with a report similar to the one
21 that you did for this case, where you evaluate all of the
22 available records and make determinations in regards to the
23 attainment level of an individual, or lack thereof, how many of
24 those would you say you have done in the course of your career,
25 Dr. Kincaid?

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1 A Oh, my. Thousands. It would be hard to calculate, but
2 thousands of them.

3 Q Over 5,000?

4 A Probably.

5 Q Now, you also reviewed in this case documents including the
6 complaint in this case, right?

7 A Yes, I did.

8 Q You also looked at the deposition transcripts of the
9 mother, Ms. Niki Hernandez-Adams, and the father, Mr. Joshua
10 Mendez; is that correct?

11 A That's right.

12 Q When you look at transcripts of the plaintiff's parents
13 what are you looking for in those transcripts? What's the
14 purpose of reviewing those transcripts?

15 A I'm looking for information about the family background, in
16 a case where there is a child involved, to find out what their
17 educational background is, their occupational history, any
18 information they are providing about the child's progress,
19 their deficits, their behavior.

20 Q Were you able to glean any of that information by reviewing
21 the deposition transcripts of the parents of this young man?

22 A Yes, I was.

23 Q For example, you were able to glean that they had an
24 incident in Brooklyn, correct?

25 A That's right.

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1 Q That the child allegedly had a lead level of nine when he
2 was tested on his one year anniversary?

3 A That's my understanding.

4 Q And you were also able to glean that at some point in time
5 they left Brooklyn and they went to Florida and then they went
6 on to Dallas? Were you able to glean that as well?

7 A That's also my understanding.

8 Q Okay. Were you able to glean that the parents had formal
9 education?

10 A Yes, I was.

11 Q That the mother had a master's --

12 A Yes.

13 Q -- in fine arts, and the father had a bachelor's and a
14 certificate after a bachelor's -- not a master's but a
15 certificate -- in some form of performance art endeavor? You
16 were able to glean that as well, correct?

17 A That's also my understanding.

18 Q Now, then you had an opportunity to look at a report by
19 Dr. Reagles, who is the plaintiffs' vocational expert.

20 Do you know Dr. Reagles?

21 A Yes, I do.

22 Q How long have you known him?

23 A I have known him since 1992, I believe, the first time that
24 I met him.

25 Q Have you ever worked together?

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1 A Well, in a sense we did. I was the teaching assistant, and
2 he was the professor. So I taught a class under his tutorship.

3 Q Now, in his review of the records and his projections, he
4 indicated that this young man had the potential, based on his
5 calculations, of becoming or of attaining rather -- I'm
6 sorry -- a professional-level degree, like medical degree or
7 law degree or something like that.

8 Now, did you see that in his report?

9 A Yes, I did.

10 Q As a vocational specialist, isn't it true that you look to
11 a variety of factors in making such a determination?

12 A That is correct.

13 Q What would be some of those factors, Dr. Kincaid?

14 A Well, I would be looking at the parental background, the
15 family background, for educational levels, to determine what
16 was common in that family, to determine how important, how
17 stressed education is for that family, because that's a good
18 indicator of the child's likely outcome for education.

19 Q Would you also be looking at national averages for the
20 attainment of those degrees -- and we are not talking about
21 ethnicity because the court has already told us before you
22 testified that we are not going to go there so we won't. We
23 are just talking in terms of the attainment by the general
24 American population. So that's the focus, okay, Dr. Kincaid?

25 A Yes.

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1 Q So do you look at the general U.S. figures to ascertain
2 what percentage of the population attains master's degrees,
3 bachelor's degrees, and advanced degrees, professional degrees?

4 A Yes, I do. That would be one of the factors I would look
5 at. The higher the degree, of course, the fewer people attain
6 that level. It's a much lower percentage in the general
7 population.

8 Q In coming up with your projections or your predictions, do
9 you then factor in -- withdrawn.

10 Do you look to see the percentage of the general
11 population, and do you do some type of comparison between the
12 general population and then the attainment of education in this
13 infant's familial background? Do you look at that?

14 A Yes, I do.

15 Q What's the reason for doing that, Dr. Kincaid?

16 A Well, to determine in general what's the likelihood of a
17 person obtaining different types of degrees, but then also the
18 family background is important because there is could be an
19 emphasis on education. There is example, influence of parents,
20 aunts, and uncles, siblings. So that's all part of the
21 factoring that I would go through.

22 Q So you look at like a family tree, for lack of a better
23 word?

24 A That's correct.

25 Q And if in the family tree you see an absence of a

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1 particular type of educational attainment and then you compare
2 that to the national average, do you then form an opinion as to
3 the probability or likelihood of this infant that has no
4 schooling whatsoever attaining that level of education?

5 A Yes. With no educational records for the child, those
6 would be important factors. I would look at what would be the
7 likelihood, the probability that they would achieve higher
8 education degrees.

9 Q So if you see in the familial background no professional
10 degree attainment, and then you look at the national average --
11 and it's relatively small, for example, based upon the records
12 that we have here, less than two percent of individuals attain
13 that professional-level education -- is that more or less in
14 accordance with your understanding?

15 A Yes. My -- I researched this subject quite often, and
16 that's been a consistent figure, two percent or less of the
17 population attain a professional degree. So that's correct.

18 Q Now, that being said, and the fact no one in this
19 individual's family tree has such a degree, what would you --
20 what type of probability quotient would you attach to this
21 individual attaining such an educational degree?

22 A It's more likely than not that they would not be able to
23 attain that degree. So it's not probable.

24 Q So it would be highly improbable, in your view, that they
25 would attain that, correct?

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1 A That's correct. It would be unlikely.

2 Q Now, so in your report or your review, would you then
3 attach a lot of significance or any significance to them
4 attaining such a degree?

5 A No. I would, again, look at the family background. That
6 would be more realistic in terms of the level of degree that
7 the individual would achieve. Research shows that the highest
8 correlation is between fathers and sons. So I would pay
9 particular attention to the level of educational attainment of
10 the father.

11 Q Do you consider any risk factors that the individual who
12 you are analyzing may have or may bring to the table in coming
13 up with your projections or predictions?

14 A Could you define what you mean by "risk factors"? I'm not
15 quite sure.

16 Q Absolutely. For example, the reason why this young man
17 supposedly or allegedly has some type of impairment is as a
18 result of lead exposure, allegedly. Right?

19 A Yes.

20 Q If there are additional risk factors that could have
21 contributed to the alleged impairment, would you look at those
22 too, in coming up with your overall analysis and predictions or
23 projections, would that be an important thing that you would
24 consider?

25 A Yes. I do consider some. Oftentimes there are different

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1 factors in terms of causation for a person's limitations or
2 deficits. So I factor that in my reports.

3 Q Now, you don't make a diagnosis or you don't offer an
4 opinion on causation, do you?

5 A No, I do not. I'm not qualified to do that.

6 Q That would be outside your area of specialization, correct?

7 A That's correct.

8 Q But you use these causal -- withdrawn. I'm sorry.

9 You use these risk factors in the analysis, correct?

10 A That's right.

11 Q Okay. Now, would you consider your report or any
12 vocational specialist's report to be thorough and complete if
13 those risk factors were not considered?

14 A I think if they are identified in the medical record they
15 bear discussion in the report and mentioned and, if they are
16 relevant, then further discussion.

17 Q Have you ever heard of the research of a Dr. Lawrence
18 Spizman?

19 A Yes, I have.

20 Q Dr. Spizman developed a model, didn't he?

21 A Yes, he did.

22 Q Could you tell us a little bit about what that model does
23 or is supposed to do?

24 A Predict vocational educational outcomes.

25 Q Is Dr. Spizman's model still widely accepted in the field

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1 of vocational rehabilitation?

2 A Not necessarily. It's -- it's background, it's quoted,
3 it's foundation research; but there is additional research.

4 Q But it's not discarded either, correct?

5 A No, it's not.

6 Q It's still a relevant piece of -- it's a relevant tool in
7 your analysis, correct?

8 A Oh, yes.

9 Q Now, using Dr. Spizman's model, initially Dr. Reagles
10 indicated that there was a likelihood of 60 to 70 percent
11 chance of attainment of a master's degree for this child,
12 G.M.M., and a better than 50 percent chance of attainment of a
13 professional degree.

14 Based on your understanding and knowledge of the
15 Spizman model, is that probable?

16 A No. In my opinion it's not probable.

17 Q Then Dr. Reagles changed his testimony and indicated that
18 he is going to step away from Spizman and he is going to use
19 different qualifications. He is not going to use percentages
20 any more. He is going to use most probable, most likely,
21 moderately likely, things along that line.

22 Even stepping away from Spizman, Dr. Kincaid, is the
23 attainment of a professional degree for this young man most
24 probable, most likely, moderately likely, or any one of those
25 adjectives?

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1 A No, I would not attribute those adjectives to the child's
2 possibility of attaining that professional degree.

3 Q Which adjectives would you be more comfortable with
4 attributing to this child's likelihood of attaining a
5 professional degree?

6 A I would say unlikely.

7 Q Unlikely. Okay.

8 Then, for the master's, he says more probable, highly
9 probable. He used additional adjectives, basically giving it a
10 higher possibility than the professional degree but still very
11 high on his scale of attainability. Now, I want you to keep in
12 mind what the national average is of attaining a master's
13 degree.

14 You are familiar with those averages, doctor?

15 A Yes. Approximately in the 15 to 20 percent range.

16 Q Right. Would you consider 15 to 20 percent to be most,
17 moderately, or most probable, or any one of those types of
18 adjectives?

19 A I wouldn't put it that high. It's not out of the realm of
20 possibility for this child, but I wouldn't say it's highly
21 probable.

22 Q Okay. Now, his mother attained a master's, but his father
23 didn't. According to your testimony, it's more -- it's usually
24 linked to the father more so than the mother?

25 A Those are the highest correlations, between father and son.

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1 Q Okay. So in your professional opinion, based upon the
2 studies that you have read and your 35 years in this field,
3 would you say then that it's more likely than not that the
4 level of attainment this child will receive, or attain rather,
5 would be around a bachelor's degree level?

6 A Yes, I think that would be more probable than not.

7 Q Okay. Now, in your field, doctor, you look at something we
8 would refer to as mitigating factors, don't you?

9 A Yes, I do.

10 Q Please tell the jury what are mitigating factors.

11 A That could be, for a person with a disability, it could be
12 education, it could be therapies, surgeries. Depending on the
13 nature of the disability, it could help them to improve their
14 functioning, their ability to be vocationally involved.

15 Q Okay. And that's important in your analysis, isn't it,
16 doctor?

17 A Yes, it is.

18 Q And why is that important?

19 A Well, I'm looking at the long-term probable outcomes for
20 the individual vocationally. So I'm looking at what their
21 level of functioning is now and what therapies, treatments,
22 even assistive technology can help that individual to improve
23 their ability to function and to perform work, earn money in
24 the labor market.

25 Q So in coming up with your final opinion, do you include

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1 that in terms of some type of a projection as to what the
2 outcome could be of this child?

3 A Yes, I do.

4 Q Why is that?

5 A Well, I'm looking for what the best outcome for the child
6 could be in the future. So I definitely would include any
7 therapies that could help them function better, improve their
8 level of functioning, ability to benefit from education and
9 eventually to work.

10 Q Now, in Dr. Reagles' report, did you see him mention
11 anything about mitigation therapies, improvements, or did you
12 see him just accept the kid at whatever level he thinks the kid
13 is and that the kid would stay -- not the kid -- I should say
14 G.M.M. would stay at that level for his entire life.

15 Which one did Dr. Reagles do, Dr. Kincaid?

16 A My understanding of reading of his report is that he
17 assumed the child would not improve, that he would stay at the
18 level identified in the medical records.

19 Q Okay. So then in your view, Dr. Reagles did not include
20 any mitigating factors?

21 A Not that I could see in his report.

22 Q Okay. Now, if I told you that in the medical records it's
23 indicated that the parents didn't take the child to get
24 occupational therapy, would that be of concern to you? Would
25 that cause you to change your calculus in any way?

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1 A Well, I certainly would have liked to have seen that take
2 place. The occupational therapy may have helped. It also
3 would have been another data point in terms of the analysis
4 from the occupational therapy, their testing, their report. It
5 would give me more insight into the child. So I would
6 definitely take it into consideration.

7 Q Okay. Now, there was some discussion and information
8 regarding the possibility of some form of hearing loss as a
9 result of an infection known as otitis media.

10 A Yes.

11 Q If I told you in the records there is no indication that
12 this child was -- hearing was ever tested by an audiologist --
13 you know what an audiologist does, right, Dr. Kincaid?

14 A Yes. They are going to test the person's ability for
15 hearing.

16 Q Okay. And that the child supposedly has certain language
17 deficits.

18 Now, the fact that they didn't take this child to be
19 formally tested by an audiologist, would that also factor in,
20 in terms of your mitigation analysis?

21 A Yes. If there had been problems identified, it would need
22 to be treated, and that may have helped the child's functioning
23 and ability to perform in school later. So I definitely would
24 have considered that.

25 Q Also, there is information in the medical records that the

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1 doctors recommended or prescribed multivitamins with iron for
2 the treatment of the alleged lead poisoning, and that was the
3 appropriate treatment. Just assume that's correct for the
4 purposes of my question.

5 Then we have testimony from -- not testimony. We have
6 records that indicate that they didn't give the child the
7 vitamins, in according to the recommendation; and the parent is
8 quoted assaying, yes, I know, we can do better.

9 Now, the fact that those multivitamins wasn't given as
10 recommended, would that also factor into your analysis of,
11 well, mitigation again?

12 A It would be a factor in mitigation. I couldn't speak to
13 the medical part of that, but it would be something I would
14 consider.

15 Q Now, with the lead poisoning allegation, at some point in
16 time the child was removed from the Brooklyn location, where
17 supposedly the lead poisoning took place, and went to another
18 location in Dallas. While in Dallas, the doctor out there
19 recommended that they test their environment, their new living
20 quarters, to see if it contained lead; and the reason the
21 doctor made that recommendation was because the child's levels
22 had spiked.

23 Now, would that information be something that you
24 would want to consider also, in regards to mitigation?

25 A In regards to mitigation, yes, that's true.

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1 Q Also, you are aware that while in Dallas they were given
2 another referral to go to early childhood intervention
3 services.

4 You are aware of that, correct?

5 A Yes, I am.

6 Q Could you tell us what that is?

7 A Early intervention services are offered to children who
8 have developmental delays in one or more areas. Usually,
9 25 percent or more. They will institute intervention services
10 that could be speech therapy, occupational therapy,
11 psychological play therapies, to help that child to develop, to
12 reach their milestones, and to mitigate any functional deficits
13 they may have; and it's offered in every state to children who
14 qualify either because of developmental delays or they may have
15 a diagnosis which is associated with developmental delays, like
16 cerebral palsy or Down syndrome, and they are automatically
17 eligible for it. It occurs between the ages of one and three,
18 or actually from birth to age three, the services are offered
19 to parents. They are given an individual family service plan
20 to implement those services and manage them.

21 Q Okay. You indicated that they need to be at least
22 25 percent of developmental delays which affect functioning,
23 correct?

24 A That's right.

25 Q That's a national standard, correct?

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1 A Yes, for the most part. It's definitely in Dallas, in
2 Texas, where they were living that is the standard.

3 Q How did you ascertain that level for Texas, Dr. Kincaid?

4 A Well, I researched what the qualifications were in Texas,
5 what their department of rehabilitation and assistive services
6 designate as the appropriate levels.

7 Q Okay. And in the event you are not qualified or you are
8 not accepted, does that by and large, based upon your
9 experience in this field for 35 years, does that by and large
10 indicate that you don't meet the 25 percent threshold?

11 A That's correct. So in all the various areas, cognition,
12 speech, behavioral, you are meeting -- you may be slightly
13 delayed in your developmental milestones but you don't meet the
14 criteria for early intervention services.

15 Q And in this particular case, when you review the records,
16 did you see any indication or notation anywhere in the file
17 that indicated that he was recommended -- "he" being G.M.M. --
18 for these services but he wasn't accepted in the Dallas
19 program?

20 A My understanding is that he was evaluated but not accepted.

21 Q And what did that tell you as a professional in this field?

22 A Well, that his developmental delays were not as high as the
23 25th percentile level. So that they didn't meet the criteria,
24 not -- wouldn't be considered severe.

25 Q Did you also have an opportunity to review the testing

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1 scores and testing results of this young man?

2 A Yes, I did.

3 Q And did you see those scores in the reports of a
4 Dr. Gordon?

5 A Yes, Dr. Robert Gordon.

6 Q Yes. Are you familiar with Dr. Gordon?

7 A I believe I have seen some of his other reports, but I
8 don't have -- haven't met him personally.

9 Q And what's the worker trait profile?

10 A The worker trait profile is based on the department of
11 labor's designation of jobs. They are defined in terms of the
12 cognitive abilities that are required, physical, various
13 aptitudes that are required to perform jobs; and you can match
14 a worker with the trait factors that are required in jobs. So
15 if you know what level a person is functioning at, you can
16 compare him to the demands of jobs, to determine what types of
17 jobs they might be suitable for or capable of performing.

18 Q At the age of two and a half to three, would you be able to
19 make any prediction with any degree of vocational
20 rehabilitation certainty that a two to three year old will or
21 will not be able to do any particular type of job?

22 A Well, what we do is we use a substitute. We look at
23 average workers and we look at the parental occupational
24 profile to match those against the demands of jobs and then
25 make adjustments for any limitations that are identified in the

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1 medical records.

2 So it's a projection based on those two factors, but
3 you would not be able to -- that particular child, they are
4 not -- they haven't been to school yet, they haven't shown
5 their full capability. So it would be impossible for that
6 child, but you can use substitutes to arrive at a reasonable
7 projection.

8 Q But again, those projections would be somewhat speculative
9 in light of the fact the child hasn't been in school yet,
10 hasn't been properly evaluated yet, hasn't performed on any
11 academic type tests yet, wouldn't you agree with that?

12 A That's right. You would like, to be more accurate you
13 would want to see how the child has been performing in school,
14 what -- their beginning evaluations for speech therapy,
15 occupational therapy, what those professionals are identifying
16 as their strengths, how they are progressing. Also, testing
17 under the No Child Left Behind Act, would start at third grade
18 through eighth grade. So you would have a much better
19 understanding of where that child is progressing and what their
20 level of abilities are.

21 Q So at this stage, at two and a half, three, or even four,
22 it would be similar to a weatherman's type of prediction?

23 MR. FRANKEL: Objection.

24 THE COURT: Do you object? Are you objecting?

25 MR. FRANKEL: Yes, judge.

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1 THE COURT: Sustained.

2 Q Now, when Dr. Reagles was on the stand and he made his
3 conclusions in terms of his projections, I asked him whether or
4 not there was any degree of certainty to which he could predict
5 or project; and he says, no, however; and then I went on to ask
6 him whether or not his projections then are similar to that of
7 a meteorologist, and at the end of the day he had to say yes
8 and he did say yes.

9 MR. FRANKEL: Objection. That's not the testimony.

10 THE COURT: Well, you may, if that's part of the
11 record, the jury will recollect it. You may inquire.

12 Q So then my question to you then, Dr. Kincaid, is: In
13 regards to attempting to predict for this young man, who at the
14 time was between two and a half and three and a half, wasn't in
15 school yet, hasn't had any real academic testing to determine
16 his true level of functioning, so to predict or project at the
17 age of two and a half or three and a half, would you agree then
18 that that was similar in nature to a meteorologist making a
19 projection?

20 THE COURT: Are you objecting to that?

21 MR. FRANKEL: Yes, judge.

22 THE COURT: Sustained.

23 Q How would you characterize, Dr. Kincaid, the projection
24 that's made for a two-and-a-half year old to a three-and-a-half
25 year old as opposed to an individual or even a youngster that

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1 maybe is in third or fourth or fifth grade, where you have had
2 an opportunity to test and review how they are performing
3 academically, how would you characterize that?

4 A Very speculative. We really need more data points. We
5 need to see what the impact of therapy is going to be, how they
6 do perform educationally, what their teachers are saying, how
7 they are scoring on national standardized tests. So we really
8 need a lot more information, otherwise it's speculative at this
9 point.

10 Q What's involved in your analysis of the transferable skills
11 of an individual?

12 A Well, where there is a child who hasn't had any work
13 experience, I look at two -- I do two analyses. One, I take an
14 average worker, who is average across all traits, their
15 cognitive abilities, physical, and all of their aptitudes, and
16 I compare that person, that hypothetical person, to the demands
17 of jobs in the labor market to see how many jobs they might be,
18 you know, have transferable skills for.

19 Then I take a look at the parents, what jobs have they
20 done in the past, and I compare the traits, abilities necessary
21 to perform those jobs against the demands in the labor market.
22 Then I would see how many jobs would match their background,
23 their experience, their abilities in the labor market.

24 So that gives me a sense of here is the average worker
25 but here are the parents and based on their experience what

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1 kinds of jobs, what types of jobs would match.

2 Q And did you find matches as it relates to this case?

3 A Yes, I did, for both scenarios.

4 Q So you found matches where the child G.M.M. would work in
5 the field of his parents, correct?

6 A Yes, that's right.

7 Q And you found matches where G.M.M. would just perform as
8 any other U.S. citizen in the workforce?

9 A With average abilities.

10 Q With average abilities?

11 A Yes.

12 Q Now, Dr. Reagles opined that at best G.M.M. would only
13 attain special ed high school diploma or GED.

14 Did you see that in his report?

15 A Yes, I did.

16 Q Are you in agreement with that?

17 A No, I'm not. I think it's, again, speculative, premature
18 because we don't know what the impact of therapies are going to
19 be, how he is going to perform in school with special -- if he
20 has enrichment tutors, special accommodations. So we really
21 don't know at this point.

22 I think that's very speculative and unlikely. The
23 deficits identified could be remediated with therapies.

24 Q Additionally, Dr. Reagles opined on G.M.M.'s work life
25 expectancy.

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1 Did you read that part of his report?

2 A Yes, I did.

3 Q Could you tell the jury what your understanding of work
4 life expectancy is?

5 A Yes. It's the probability that an individual is going to
6 be involved in the labor market, alive and involved in the
7 labor market; and that varies by age that the person enters the
8 labor market, the age they are now, their educational
9 background. The higher your educational background the more
10 likely you are to stay engaged in the labor market, to work
11 more years. The lower your educational background, of course
12 it would be considerably lower for someone less than a high
13 school education.

14 Q So he concluded that G.M.M. will have a truncated or a
15 reduced work life expectancy because of this special ed diploma
16 that he is going to get, correct?

17 A Yes.

18 Q Do you agree with that?

19 A Well, if that was actually the case, he would be right, but
20 I don't agree with him that that would necessarily be the
21 outcome for G.M.M. Again, we haven't seen the impact of
22 therapies, of enriched education. He could overcome some of
23 those early deficits.

24 So I don't agree with assigning just a special
25 education degree. It is premature.

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1 Q There are studies -- correct me if I'm wrong,
2 Dr. Kincaid -- that strongly support your position that with
3 enrichment and with further educational opportunities that he
4 will improve, if he is in fact at the level that he appears to
5 be at right now, correct?

6 A Yes. Therapies are very effective in terms of improving
7 ability with expressive speech and attention concentration,
8 working memory, the areas that were identified as low for him.
9 Therapies and educational enrichment could help him in those
10 areas.

11 Q Did you see in the records, Dr. Kincaid, that when he did
12 receive a small amount of speech therapy that he did improve in
13 that area? Did you see that in the records as well?

14 A I don't believe I had that record.

15 Q Okay. But if you did have that record --

16 MR. FRANKEL: Objection.

17 THE COURT: I haven't heard the question.

18 MR. FRANKEL: Sorry.

19 Q If you did have such a record, would that then be in
20 accordance with your position that enrichment improves the
21 individual's functional level?

22 A Yes, absolutely.

23 MR. FRANKEL: Objection.

24 THE COURT: Overruled. You may answer.

25 THE WITNESS: Oh, I'm sorry, your Honor.

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1 A (Continuing) Yes, it would buttress my opinion that that in
2 fact therapies do have a positive impact.

3 Q You did an analysis of future opportunities and earning
4 capacities, correct?

5 A Yes.

6 Q Could you tell us what that is?

7 A Well, I look at an individual's ability in the future to
8 earn, and that's based on educational attainment. A person not
9 only will be in the workforce longer, but they will earn higher
10 salaries, wages, depending on their educational background. So
11 depending on what would be reasonably predicted for the
12 individual, you can find correlating -- corollary wage rates,
13 salaries for those educational degrees.

14 Q So and you did do that analysis for G.M.M. as well?

15 A Yes, I did. I looked at for the future for him,
16 considering that he is likely to benefit from therapies and
17 enriched education, that bachelor's degree is not out of the
18 realm of possibilities for him. It would be probable with
19 improvement in those areas.

20 Q So to conclude, doctor, you opined that as a result of all
21 of the analyses that you did in looking at this record of this
22 young man, G.M.M., that he can attain a bachelor's degree,
23 correct?

24 A It would be likely -- if he obtains the appropriate
25 therapies and educational enrichment, it would be a probability

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1 for him, with improvement in those areas where he now has
2 deficits, which would be more likely with treatment and
3 enriched education.

4 Q You also opined that his ability to attain a professional
5 degree is highly probable, correct?

6 A I like highly improbable.

7 Q Right. Highly improbable.

8 A Improbable.

9 Q Highly improbable. It's more likely than not that it's not
10 going to happen?

11 A That's correct.

12 Q And that was predicated upon the fact that less than
13 two percent of the general population have those degrees in the
14 first place, correct?

15 A That's right.

16 Q And the fact that no one in his extensive family tree has
17 any professional training either?

18 A That's right. The combination of the two would make it
19 very unlikely.

20 MR. ARCHIBALD: Thank you, Dr. Kincaid. I have
21 nothing further on direct.

22 THE COURT: Thank you. Cross-examination, please.

23 MR. FRANKEL: Thank you, judge.

24

25

Kincaid - Cross/Frankel

1 CROSS-EXAMINATION

2 BY MR. FRANKEL:

3 Q Good morning, Dr. Kincaid.

4 A Good morning.

5 Q My name is Steven Frankel, and Stephen Cantor and I
6 together, we are representing the plaintiffs in this case, the
7 mother as well as the child.

8 A I see.

9 Q Doctor, do you have your file with you?

10 A Yes, I do.

11 Q Could you take out the page that shows information
12 requested. I think it's the cover page, but it might be in a
13 different place in your file.14 A I don't see it in my file. Usually it's in the front, but
15 I didn't see it.16 Q Okay. But you do have such a cover page. You sent it to
17 Mr. Archibald.18 A I do have, yes. I do have a page as listed I would send to
19 an attorney who is retaining me.20 Q So if we could go through the items, please, one at a time.
21 The first is hospital medical records, admission sheet.

22 Did you get such a document?

23 A No.

24 Q Discharge summary, did you get that document?

25 A No.

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1 Q Operative reports, did you get operative reports?

2 A No. There were none in this case.

3 Q Well, relating to the mother.

4 A Oh, oh, I see.

5 Q An issue that Mr. Archibald continues to raise.

6 You didn't get anything regarding her surgery?

7 A No, not -- no.

8 Q You do request it, however?

9 A If it's pertinent I do put it in my list of documents. So
10 if it's pertinent I ask the attorney to send it to me.

11 Q Physician's narrative, you didn't get that?

12 A Well, I did get notes and I did get reports.

13 Q From the pediatricians, correct?

14 A Yes, the pediatricians.

15 Q Not anything to do with her surgery?

16 A No.

17 Q Diagnostic tests, like MRIs, CAT scans, not relevant,
18 didn't get those?

19 A No, not relevant.

20 Q Functional capacity evaluations?

21 A Not relevant in a child.

22 Q Now, employment records. He is an infant, so I take it
23 that's the parents.

24 A Yes, or employment history.

25 Q Okay. So earnings records, did you get those for the

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1 mother and father?

2 A No.

3 Q Tax returns and W-2s, mother and father?

4 A No.

5 Q Social Security Administration earnings statement, mother
6 and father?

7 A No.

8 Q No means not either?

9 A That's correct, neither.

10 Q Job descriptions?

11 A No, other than what they described in their deposition.

12 Q Performance evaluations, meaning at their jobs?

13 A Yes.

14 Q You got those?

15 A No. I might add that listing encompasses child cases plus
16 adult cases so some of those items would be more related to
17 adults than children. It's kind of a broad list. So it's only
18 what applies to the case.

19 Q Education records, like transcripts?

20 A In this case the child hasn't been in school yet, so it
21 wouldn't be applicable.

22 Q But, doctor, you are commenting quite often about the
23 parents' careers, the parents' degree of education that impacts
24 on the child.

25 Wouldn't it benefit you to know how well the parents

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1 did in school, in graduating with a bachelor's and the mother
2 with a master's?

3 A I certainly would have considered it if it had been given
4 to me.

5 Q You would have considered it though?

6 A Oh, yes.

7 Q So that's not something that factored into any of your
8 projections?

9 A No. I just looked at the fact that they had attained those
10 degrees.

11 Q And other expert reports, which ones did you actually have
12 copies of?

13 A Dr. Reagles' report and Dr. Tinari, so both economics
14 reports, and of course medical records.

15 Q Do you know who Dr. Auciello is?

16 A No, I don't.

17 Q Have you heard his name?

18 A I don't recall that name. I can look at my --

19 Q Please, by all means.

20 A See if that was. No, I have no records from that doctor.

21 Q If I tell you that Dr. Auciello is the defendant's
22 neuropsychologist who tested this child, issued a report, and
23 testified before this jury about various aspects of his
24 findings with regard to the child, the deficits, things of that
25 nature, now, taking that as a given, would it not have helped

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1 you in forming your conclusions and opinions to have heard from
2 their neuropsychologist, who tested the child, spoke at length
3 about the child's behavioral issues, complicated problems, the
4 child's future, would that not have been important for you to
5 have, Dr. Kincaid?

6 A I certainly would have considered it, if it had been
7 provided to me.

8 Q But Mr. Archibald never even mentioned the name of this
9 man, did he?

10 A Not that I recollect.

11 MR. ARCHIBALD: Objection, your Honor.

12 THE COURT: You may ask answer.

13 Q What experience, doctor, you said you do special ed, was it
14 teacher? I'm not sure exactly.

15 A I was adjunct professor teaching master's level special
16 education teachers about how assistive technology helps
17 individuals to learn.

18 Q Did part of that teaching and training cover children who
19 had lead poisoning?

20 A It covers children who have various deficits, learning
21 deficits. So they may have that. That may be the
22 precipitating cause, but there are learning deficits you
23 ameliorate with technology.

24 Q Now, in terms of deficits in general, there are some
25 deficits that are not permanent, correct?

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1 A That's true. That can be improved over time, physical or
2 cognitive.

3 Q I'm sorry.

4 A Physical or cognitive, yes.

5 Q They can be improved. Some can be improved over time, and
6 some that are not physiological, so to speak, can be more
7 likely improved over time?

8 A Could you be more specific? I'm not sure.

9 Q How about -- what's your background in understanding
10 children who have suffered lead poisoning?

11 A I understand that there are cognitive neurological
12 consequences to it.

13 Q Are you aware that brain damage is a result of lead
14 poisoning, especially with newborns, infants, and toddlers?

15 A Yes, I'm aware of that.

16 Q Are you not also aware that it's permanent?

17 A I would leave that to a medical diagnosis. It depends on
18 the level, severity, and length of time. So, you know, I think
19 that would be a medical decision.

20 Q Thank you. So two doctors -- well, Dr. Auciello,
21 neuropsychologist, and a Dr. Klein, who is a pediatrician, both
22 testified here in this court and both of them said it's
23 permanent, not reversible, and the child will have that for the
24 rest of their life.

25 You didn't consider that in any of your computations,

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1 did you?

2 A Well, I did consider the functional limitations that were
3 identify for the child, so.

4 Q But isn't it true, doctor, the functional limitations
5 change sometimes, as you just said.

6 If a child has behavioral issues they may outgrow
7 certain other things, but permanent brain damage is different?

8 A That's different, but they can still benefit from therapies
9 to help them utilize, improve the other parts of their brain
10 that aren't damaged. So therapies can help it greatly.

11 Q That in and of itself, as you say, is a maybe; hopefully
12 they will benefit, but you don't know?

13 A Without having had the child go through the therapies and
14 to determine to be evaluated by therapeutic specialists, it
15 remains to be seen, but it is -- could be definitely a
16 possibility for the child. Therapies do help.

17 Q Now, you didn't read -- did you read Dr. Gordon's report,
18 the neuropsychologist report for the plaintiff?

19 A Yes, I did.

20 Q That you did. Did you see where Dr. Gordon spoke about the
21 behavioral issues that are a great concern for the child's
22 future learning ability. Being in a classroom he didn't sit
23 still, he is aggressive, he has violent outbursts, he hits
24 other children, bites other children. That's not only from
25 Dr. Gordon, it's also from Dr. Auciello. Both of them talked

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1 about that, and it's documented.

2 Now, it's coming from records in the school as well as
3 from the mother. Now, did you factor that into the
4 consideration of how well this child is going to do likely in a
5 regular school in the future?

6 A Yes. I also noted that Dr. Gordon recommended play therapy
7 for G.M.M., to assist with coping behaviors, and that in the
8 records it also indicated that with a structured environment he
9 performed better in preschool. So I did look at that as that
10 he could probably benefit from therapies, that it was a problem
11 for him, but he hasn't had the therapies yet.

12 Q Can we go back to the question, please?

13 A Sure.

14 Q Those issues, he may benefit from therapies, but if he
15 doesn't improve his behavior and cannot sit in a classroom and
16 never be a regular student in a regular school, would that
17 impact upon your testimony and your conclusions?

18 A Assuming that was correct, yes, it would, if that was
19 actually true. Then it would.

20 Q But you didn't know Dr. Auciello, their neuropsychologist,
21 spoke about that and the concerns he has?

22 A I was not aware of his testimony so I can't really comment
23 on it.

24 Q Or his conclusions?

25 A That's correct.

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1 Q So when you said, doctor, I believe -- and, please, I don't
2 want to put words in your mouth -- you said in substance you
3 think there is a potential for this child to get a master's
4 degree but certainly to graduate with a bachelor's degree, you
5 said something like that?

6 A A bachelor's degree, I said there was a potential for him,
7 with the proper therapies and improvement in education, with
8 educational enrichment, to overcome his deficits.

9 Q And when Dr. Auciello disagrees and thinks that perhaps a
10 special type of training or schooling might be possible but not
11 a regular BA in a college, very unlikely, you don't agree with
12 that?

13 A Well, I'm not aware of his opinion, but in my experience
14 those therapies and educational enrichment do help children
15 with the types of deficits that he has, to improve their
16 ability to benefit from education and to progress farther in
17 the educational system.

18 Q So although you are not a neuropsychologist, are you
19 discounting what both Dr. Gordon and Dr. Auciello both found
20 after examining and testing this child? You are discounting
21 their opinions or disagreeing with their opinions?

22 A Well, I did take into account Dr. Gordon's opinion when I
23 wrote my report and his recommendations for speech therapy and
24 play therapy to improve his functioning, his behavior. So,
25 yeah, I definitely took those opinions.

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1 I'm not aware of Dr. Auciello or what he testified to.

2 Q There is no question everyone is recommending every kind of
3 therapy for this child, occupational, speech; and hopefully he
4 will be able to get all of those things.

5 But with these other behavioral issues, you have no
6 idea what the neuropsychologist testified to as to the impact
7 that might have on his ability to go to a school and to learn?

8 A It would. A child that would have those types, if he was
9 still exhibiting those, we don't know what therapy would do to
10 alleviate some of those at this point, but he would probably
11 need some -- he would need special assistance in school to
12 participate.

13 Q How about things like short attention span, acting out,
14 angry outbursts, if those things continue, and speech therapy
15 and intervention won't necessarily impact on those things; is
16 that correct?

17 A Not necessarily behavioral issues, but the child would be
18 eligible for a paraprofessional, who would be with him through
19 the day to try to circumvent those outbursts and to redirect
20 him, for their attention so they can participate in school. So
21 if those were actually still occurring, he would be a candidate
22 for that special assistance.

23 Q So let's talk about that. The mother testified that the
24 school he was in he liked. It's like a pre-K. He enjoyed
25 going there, and she felt he was benefiting; but they told

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1 them, the family, that he has to have a shadow, a
2 paraprofessional, as you mention, if he is going to continue in
3 the school.

4 But where they are in Dallas, the family would have to
5 pay for the paraprofessional through the school system; and
6 they have no insurance for it. The insurance company doesn't
7 cover it, and they don't have the money to pay for that. So he
8 can't go to a school already that could benefit him because
9 they are not equipped to pay for it or cover it.

10 Does that change anything which you just testified
11 about?

12 A Yeah. I don't know what process they have gone through,
13 but I do know the special education system, that they could
14 apply for special education services for their child. I don't
15 know if they have actually gone through that process, but
16 that's across the United States. Those services are available
17 to children with developmental delays or behavioral problems.

18 So I'm surprised that they don't have it because they
19 would be eligible for it.

20 Q So you know for sure that they could get all of this stuff?

21 A I know they would be eligible. I don't know what process
22 they have gone through because I haven't seen that --

23 Q It's a state-by-state issue?

24 THE COURT: Excuse me. Let him finish.

25 Q They can do whatever they want to do.

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1 THE COURT: Excuse me. Let him finish his answer.

2 Do you have something you want to add?

3 A Each state has their criteria, but children with these
4 types of deficits are eligible for special education services.

5 Q But you also testified that he didn't meet the level to get
6 that kind of assistance, and you researched it, correct?

7 A We were talking about early intervention, which is
8 developmental delays at the 25th percentile level.

9 If he is having behavioral problems, he would be
10 eligible for special education services.

11 Q But you didn't examine whether or not he definitely would
12 be eligible, qualified, and he could have all of these things
13 done?

14 A I think he needs more evaluations from specialists in the
15 school system to arrive at that decision; and, as I said, there
16 are not enough data points to really predict that, his outcome.

17 Q Now, doctor, you are aware of the Centers for Disease
18 Control?

19 A Yes.

20 Q Is there any question about their importance and
21 qualification in studying things like toxins and poisons that
22 may impact on children?

23 A No. They are a national authority.

24 Q And they have spoken and tested -- I'm sorry. Withdrawn.

25 They have studied and spoken and filed reports about

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1 the impact of lead at the earliest stages with a child?

2 A That's correct.

3 Q Are you aware that the Centers for Disease Control has
4 found in surveys -- and it's Dr. Needleman.

5 Have you ever heard that name, Dr. Needleman?

6 A Yes, I have.

7 Q He is well respected, is he not?

8 A He is published, yes, he is an expert in this area.

9 Q And both neuropsychologists acknowledge he is one of the
10 preeminent people in the field?

11 A That's correct.

12 Q And when I asked both of them, either one, first one and
13 then the other, first Dr. Gordon and then Dr. Auciello, were
14 they aware of Dr. Needleman's findings that children who were
15 exposed to toxic lead paint byproducts at the earliest ages
16 tend to go through life later on and be aggressive and vital.

17 Are you aware of that?

18 A Yes.

19 Q And those children, when they get older, very often are
20 involved in criminal behavior.

21 Are you aware of that?

22 A Yes, and it varies by level of exposure. I understand that
23 as well.

24 Q Now, if I just -- excuse me. Now, you were giving us
25 numbers, percentages, where general population for this and

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1 that.

2 When you talk about the general population for
3 children who end up completing a bachelor's degree what's that
4 number, percentage?

5 A It's above 50 percent.

6 Q Fifteen?

7 A No, 50 percent.

8 Q Five, zero?

9 A Yes.

10 Q Okay. Does that increase where the parents both have
11 bachelor's degrees and the mother has a master's degree as
12 well?

13 A Yes. More likely to see the children be attaining
14 bachelor's level degrees.

15 Q So what percentage might that be?

16 A I don't recall the exact for that group, but it increases.
17 The more education in your family background, the more likely
18 you will also have similar education.

19 Q Dr. Reagles testified about the parents' educational level
20 and that the child and children growing up with parents who are
21 educated and have achieved bachelor's and master's degrees
22 generally go as far, if not farther, than the parents. They
23 are not often limited by the parents' education.

24 Do you agree with that?

25 A They wouldn't necessarily be limited, but it's not

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1 necessarily probable also that they will exceed.

2 Q Now, what other risk factors did you ascertain for G.M.M.?

3 A Could you be more specific about risk factors?

4 Q With what he is suffering from now, with the injury he
5 suffered, and the resulting issues that he faces going forward.

6 A In the neuropsychological testing, there were deficits
7 identified for working memory, for, if I recall, he also had
8 problems with attention, and concentration and expressive
9 language were the areas that were the most problematic as well
10 as the behavioral problems. So those were the four areas that
11 were of concern to Dr. Gordon, and he recommended that therapy
12 be instituted.

13 Q Now, doctor, what was the fee you charged for preparing
14 your report for Mr. Archibald?

15 A \$3,900.

16 Q And to testify today?

17 A \$3,500.

18 Q So, doctor, if a forensic economist testified here the
19 other day that despite the parents' bachelor's degrees and the
20 mother's master's, that it was only 35 percent likely that the
21 child would attain a bachelor's degree, do you agree with that?

22 A Well, I don't know what they are referring to with studies.
23 I wouldn't disagree, but I would like to know what they are
24 referring to, what they are, what they base their opinion on.

25 MR. FRANKEL: One second.

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1 (Pause.)

2 Q Doctor, Mr. Archibald asked you about things like hearing
3 problems, otitis media; and clearly everyone agrees that if
4 some child has hearing problems that will impact on speech,
5 learning and other things.

6 A Yes, that's correct.

7 Q And those are things you considered when you were writing
8 your report?

9 A I did note them. So I did look at the medical records, and
10 it was identified as a problem.

11 Q Before you testified today did Mr. Archibald tell you that
12 the child's pediatrician, Dr. Frank, testified here in this
13 court and she addressed that and told the jury that the hearing
14 was just a one-time thing. It was resolved. The child never
15 had a problem hearing after that; and so no clinician, no
16 pediatrician here or in Dallas, ever once indicated in a record
17 that this child has any issues with hearing but Mr. Archibald
18 didn't tell you that did he?

19 A I was not aware of that.

20 MR. FRANKEL: Okay. Thank you. I have nothing
21 further.

22 THE COURT: Redirect?

23 MR. ARCHIBALD: May I from here?

24 THE COURT: Yes, you may.

Kincaid - Redirect/Archibald

1 REDIRECT EXAMINATION

2 BY MR. ARCHIBALD:

3 Q Dr. Kincaid, earlier Mr. Frankel asked you about
4 transcripts and the grades that the parents may have attained.5 How relevant is that in your calculus of any
6 vocational expert's calculus as to the attainment level of a
7 child?8 A It's not that relevant. If it was available, I would look
9 at it, but the most important factors are they did attain a
10 bachelor's degree or master's, the level of educational
11 attainment would be important.12 Q When you are looking or any vocational expert is looking,
13 they are looking across professions and degrees, right, not
14 whether the person graduated with a 2.0 or a 3.0. That's not
15 what you are looking at, correct?16 A I'm looking at level of attainment is the most important
17 factor.18 Q Right, that is it. So the fact that you didn't look at the
19 grades, how material is that in coming up your opinion?

20 A It did not -- it would not impact my opinion.

21 Q So it's immaterial?

22 A That's correct.

23 Q Okay. Now, counsel asked you about retention fees, what
24 you were paid.

25 In your industry, when an expert like yourself

Kincaid - Redirect/Archibald

1 testifies, you are always paid for your time away from your
2 practice to come to court and testify, correct?

3 A That's correct.

4 Q It's standard in the industry, correct?

5 A Yes.

6 Q Okay. So, for example, Dr. Reagles appeared and testified.

7 Would it be fair to assume that Dr. Reagles was also
8 paid to testify?

9 A I would imagine so, yes.

10 Q And to prepare his report as well?

11 A Yes.

12 MR. ARCHIBALD: Thank you.

13 THE COURT: You may step down. Thank you, doctor.

14 THE WITNESS: Thank you.

15 THE COURT: Do you have another witness?

16 MR. ARCHIBALD: No, your Honor, I rest.

17 THE COURT: Is there any rebuttal?

18 MR. FRANKEL: Nothing further, judge.

19 THE COURT: Both sides rest. Why don't you give us
20 about 15 minutes, ladies and gentlemen. Do not discuss the
21 case, please.

22 (Jury exits.)

23 THE COURT: Does the defendant wish or plaintiff wish
24 to make any motions?

25 MR. ARCHIBALD: Defense will have a few.

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1 THE COURT: All right. I will be happy to hear you.

2 MR. ARCHIBALD: Your Honor, I renew my motion from
3 yesterday, in regards to those two witnesses that testified,
4 who in my view are incompetent to have so done. It is my hope
5 that the court had an opportunity to recalibrate its position
6 and would rule in favor of the defense because it's highly
7 prejudicial to permit those testimonies that went in to go to
8 the jury.

9 I move that those two witnesses, Mr. Eweke and
10 Ms. Kogan, that their testimonies be stricken, your Honor.

11 THE COURT: Denied. I have read your brief, which is
12 very good, and I am aware of the Supreme Court and lower court
13 decisions supporting your view.

14 My opinion, given the seriousness of the case and the
15 policies and the various rules, and the obligations of a
16 district judge, having now determined that the testimony
17 indicated substantial reliability in the tests, it would be a
18 miscarriage of justice to exclude them, because without their
19 introduction it's doubtful that a verdict would stand. So I
20 believe that I have satisfied the rules and the policy in
21 allowing them in under hearsay and relevancy and general
22 policy.

23 But it's an interesting point and you can take it up,
24 as I believe you will.

25 MR. ARCHIBALD: Indeed, your Honor.

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1 My second motion is in regards to the jury charges,
2 your Honor.

3 THE COURT: Yes?

4 MR. ARCHIBALD: I did brief it as well. You should
5 have the brief on ECF.

6 Your Honor, the inclusion of compensatory damage in
7 this case is unfounded. It's not supported in fact or in law.
8 For example, your Honor, you indicated that under Rule 15 you
9 have the authority as the district judge to make the
10 appropriate amendment to their pleading. Correct, your Honor?
11 And they didn't plead it, and that's a fact. So we can move
12 away from that.

13 Now, in looking at whether or not punitive damages
14 should be awarded in a case, the authority is clear. You need
15 to look to the testimony to see whether or not there is
16 exemplary malicious, wanton behavior or conduct on the part of
17 the defendant. Let's look at the witnesses who testified.

18 Mrs. Hernandez. Okay. Mr. Kimpson was a very nice
19 landlord. He was responsive. She testified that the place was
20 in pristine condition, save and except some of the painted
21 molding. She claims they were chipped, some of them. When
22 asked did you tell my client, did you complain about it? Her
23 testimony was no, she did not. Yet anything she complained to
24 him about, boom, he was there. He took care of it. So then
25 how can you say what Mr. Kimpson did was wanton, malicious,

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1 reckless, and the like.

2 Let's talk about the renovations. Counsel threw in
3 all the red herrings he could find. No pay stub. No tax
4 return, no of this, all of which is immaterial, your Honor.
5 They are immaterial. What's material here is the quality of
6 the work he did. We had a professional engineer, Mr. Flynn.
7 Mr. Flynn said the walls are perfect, the floor is perfect,
8 it's done in accordance with building industry standards.

9 Then there was an issue. Okay. Let's see the issue.
10 We have an issue here that deals with whether or not the
11 condition of the property in 2015 was similar to the condition
12 of the property in 2012 or 2011. Their witnesses helped prove
13 that for us, your Honor.

14 THE COURT: Say that again.

15 MR. ARCHIBALD: Their witnesses helped prove that the
16 place was in pristine condition. Mr. Eweke, less than
17 credible, less than credible in all his iterations of the
18 story, whether they can read through the Sheetrock, whether
19 they can't. He was incredible in his testimony, but he did say
20 the following, because he had to, your Honor. The condition of
21 the property, all the paint, fair. Then he wanted to obfuscate
22 and say fair could be poor, it's subjective. Nonsense. Fair
23 means it was in good continue condition and there was nothing
24 wrong with it.

25 Then he read the comment section. Every single room

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1 in the comment section was intact, good contact, intact, good
2 condition.

3 Then when asked, okay, the 23 violations that you
4 found, where were they? They were primarily, if not
5 exclusively, on the moldings; and we know what happened to the
6 moldings, don't we? They were scratched by that ill-tempered
7 beagle, by that beagle that suffered from a neurological
8 deficit, if you will. She testified that the dog scratched up
9 the door and scratched it up so bad they had to come in and put
10 up Plexiglas. Her testimony. Then she said, you know what, he
11 only scratched that one door. How plausible is that, your
12 Honor?

13 Then we had the testimony again of Mr. Flynn and
14 Mr. Kimpson showing, yeah, look at the pet marks all over the
15 place. There were several doors, doors jambs, window jambs,
16 moldings and the like that was violently scratched away, and
17 guess what your Honor, we must say, like I said, the areas that
18 we checked, that the paint wasn't -- that the paint may have
19 been disturbed or peeling on, was in the wooden areas,
20 corroborating the story, your Honor. It corroborates what
21 Mr. Kimpson said, it corroborates what Mr. Flynn testified to,
22 the condition he saw the place in, it also corroborates the
23 story of their own witness, their star witness,
24 Ms. Hernandez-Adams. She said the place was in beautiful,
25 pristine condition.

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1 We asked the realtor, discuss for us the condition of
2 that place. Beautiful. You saw the pictures, too, your Honor.
3 The place was beautiful. Mr. Kimpson did a meticulous job in
4 restoring that place. Everybody spoke of the beauty of the
5 woodwork. That's the charm of a brownstone, and that's what
6 was done here.

7 So show me, show me where there is any indication that
8 my client did anything that was reckless, that was malicious,
9 that was wanton, or anything; and that's the standard for
10 punitive damages. We don't have it in this case, your Honor.

11 So although you have a right under rule 15 to make the
12 amendments *sua sponte*, you can't do so without the requisite
13 factual basis for so doing, and for that reason I say this has
14 to be stricken, your Honor.

15 THE COURT: Well, you make an interesting argument. I
16 want to say first, that in making the decision I am not going
17 to rely on the renting by the defendant of these premises after
18 charges of lead dust had been made and apparently without
19 further repairs --

20 MR. ARCHIBALD: Your Honor, that's incorrect, your
21 Honor.

22 THE COURT: May I finish?

23 MR. ARCHIBALD: Yes, you may.

24 THE COURT: -- to another woman, who was pregnant and
25 delivered apparently in or at least took the infant to the

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1 premises. As I read the testimony, the jury could conclude
2 that no further changes were made after the defendant -- the
3 plaintiff left. So I'm not basing my decision with respect to
4 punitive damages on those issues, which were post-departure
5 from the premises by the plaintiff.

6 But I do think that even on the basis of what the
7 defendant testified to, the jury could conclude that he was
8 reckless. I must say he showed an amazing degree of lack of
9 recollection or lack of knowledge for what was going on in this
10 apartment and the dangers of dust. And the jury can take that
11 into consideration in deciding credibility.

12 Whether I will allow a punitive damage award to stand
13 is another question. I'm dubious about it, and I reserve the
14 right to set it aside by the evidence; but I'm allowing it to
15 go to the jury. If this goes up on appeal I don't want to have
16 to retry it on the grounds that we should have granted it.
17 That is granted, that damage award issue.

18 Do you have another point?

19 MR. ARCHIBALD: I think the court was unclear on one
20 point. In regards to the post-remedial repairs, I think the
21 court was suggesting that my client showed wanton behavior by
22 not doing anything to the apartment he rented.

23 THE COURT: I'm not suggesting anything. I'm not
24 taking it into account. Whatever the evidence is in the case
25 without objection on that point goes in before the jury and

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1 would be relevant in any event independently on the credibility
2 of the defendant; but, as I recall the testimony, there was no
3 request for such a decision and statement to the jury on
4 limited use.

5 MR. ARCHIBALD: But, your Honor, to just clarify the
6 record, though, because it still seems as though the record is
7 not clear, or maybe I'm misinterpreting what the judge -- what
8 you are saying, your Honor, is that the testimony from my
9 client is after the board of health came in and they say, well,
10 these are the areas, it was all to the moldings, and those
11 repairs were effected before anybody else moved in because they
12 came back and retested.

13 THE COURT: I didn't read that from the evidence.

14 MR. ARCHIBALD: That was --

15 THE COURT: Any changes were made by the defendant
16 after the plaintiff left. If you show it to me, I will be
17 happy to hear it.

18 MR. ARCHIBALD: Your Honor, let me show you this
19 exhibit.

20 THE COURT: Let me see it in the testimony. The
21 pictures I allowed in --

22 MR. ARCHIBALD: I understand that.

23 THE COURT: Excuse me.

24 -- as a matter of grace to the defendant.

25 MR. ARCHIBALD: Yes?

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1 THE COURT: But I don't find them, having reviewed
2 them carefully, as necessarily supporting your view. I cannot
3 read from those pictures the dog bites or scratches. There are
4 different colors, but I just can't read them. I have allowed
5 them to go in, and I assisted you in putting them in by
6 extending the rules of evidence to permit your client to say
7 that this is what it looked like when they left. You recall
8 that.

9 MR. ARCHIBALD: I recall that, your Honor.

10 THE COURT: Those photos were taken many years after
11 the event, when there was an intervening occupation by another
12 tenant. So they could have been left -- they could have been
13 excluded. But I understood the limits that the defendant had,
14 since he didn't take pictures concurrently with the plaintiffs
15 leaving. But I can't read what you are reading into those
16 pictures. The jury may be able to, but I can't.

17 MR. ARCHIBALD: May I speak, your Honor?

18 THE COURT: You may.

19 MR. ARCHIBALD: This is what I'm saying to you, your
20 Honor.

21 THE COURT: We are talking about exhibits number?

22 MR. ARCHIBALD: This is Exhibit 01.

23 THE COURT: There are numbers annexed to it?

24 MR. ARCHIBALD: Right. Your Honor, the basic tenets
25 of evidence when it comes to photographs of a location, you

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1 introduce a photograph and you ask the person who has
2 knowledge, is this the way it looked back when it was taken?
3 Yes. Has anything changed? For example, your Honor, if there
4 is natural wear and tear to something, that's not the way it
5 would have looked two or three years ago.

6 THE COURT: Excuse me? I have allowed it in.

7 MR. ARCHIBALD: I know you have, your Honor.

8 THE COURT: I disagree with you with respect to the
9 power of the judge to have kept those photographs out. I have
10 let them in. So there is no point in arguing about exclusion
11 of the photographs. They are in before the jury, and you can
12 argue anything you would like. I do not read those pictures as
13 showing dog scratches or bites.

14 MR. ARCHIBALD: But my experts do.

15 THE COURT: Excuse me. If you can convince the jury,
16 fine, I'm permitting you to argue it. So I don't understand
17 why the pictures are being discussed now.

18 MR. ARCHIBALD: Well, they were being discussed, your
19 Honor, because you were saying that you are not convinced that
20 the condition of the premises, in terms of the repair that was
21 done, was effected after my client -- after the plaintiffs move
22 out and there was a subsequent occupancy. Correct, your Honor?

23 (Continued on the next page.)

24 Certified to be a true and accurate transcript.

25 /s/ Michele Nardone

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1 (In open court, outside the presence of the jury.)

2 THE COURT: But I'm saying I am not considering his
3 subsequent rental.

4 MR. ARCHIBALD: As you shouldn't, under the
5 circumstance.

6 THE COURT: The main issue, however, with respect to
7 the period after the plaintiff left some years, when there was
8 at least one other occupancy, and whether any of those damages
9 that you assert are shown by the pictures occurred during that
10 period. That's for you to argue and the plaintiffs to argue.
11 I will consider that factor and all other factors in the case
12 when and if there is a punitive damage award, which I will then
13 consider when you move to set it aside.

14 MR. ARCHIBALD: Fair enough, Your Honor.

15 THE COURT: Do you have another argument?

16 MR. ARCHIBALD: No, I do not, Your Honor.

17 THE COURT: Does the plaintiff have an argument?

18 MR. FRANKEL: No, Judge. I just need some time to set
19 my stuff out and go to the men's room.

20 THE COURT: How much time will the plaintiff require
21 for argument?

22 MR. FRANKEL: I'm sorry -- no argument? How much
23 time? I'm guessing, I think maybe an hour and-a-half, Judge.

24 THE COURT: An hour and-a-half?

25 MR. FRANKEL: There's testimony of so many witnesses.

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1 THE COURT: I'll allow it.

2 And how much argument --

3 I'll give you ten minutes for rebuttal.

4 MR. FRANKEL: Ten minutes for rebuttal?

5 THE COURT: Yes.

6 MR. FRANKEL: Thank you, Judge.

7 THE COURT: How time will the defendant require?

8 MR. ARCHIBALD: Half an hour, 40 minutes, Your Honor.

9 THE COURT: Then I think what we ought to do is bring
10 back the jury. It's now 11:30. And you can go until one,
11 although I think myself such a long argument is self-defeating,
12 but if you want to take an argument of an hour and-a-half, I'll
13 give it to you. Then we'll break for lunch, and we'll have the
14 defendant's arguing and then rebuttal of an hour. So that will
15 get us to three o'clock.

16 That will mean I can charge today, and the charge will
17 take quite sometime to give, because the plaintiff has asked
18 for all of these provisions to be inserted and I inserted them.

19 Now, we may have a half-an-hour or so of deliberations
20 at the end of the day, and then we'll start again tomorrow
21 early, at 9:30. Does that seem satisfactory?

22 MR. CANTOR: Yes, Judge.

23 MR. ARCHIBALD: Yes. That's fine.

24 THE COURT: All right, then. Bring in the jury.

25 MR. FRANKEL: Of course, Judge. That's fine.

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1 THE COURT: Take a few minutes.

2 MR. FRANKEL: Yeah. If I can, Judge? Thank you.

3 THE CLERK: Judge, these are the copies that were
4 requested this morning. (Handing.)

5 THE COURT: Yes. Is there anybody objecting now to
6 the charge that was approved yesterday?

7 MR. FRANKEL: Not the charge, Judge. I think just the
8 verdict sheet, we had some issue.

9 THE COURT: What is the objection?

10 MR. FRANKEL: Did you make notes.

11 THE COURT: Page? What are you objecting to?

12 MR. CANTOR: Nothing yet, Judge.

13 MR. FRANKEL: No, I just want to make sure. I think
14 the Court made some changes. So I want to make sure there's no
15 issue. I'm going to start setting up if I can, Judge.

16 THE COURT: Excuse me. I'm waiting for your answer.

17 MR. FRANKEL: Oh. I'm sorry.

18 Counsel?

19 MR. CANTOR: Judge, it looks fine so far. I haven't
20 completed it, but it looks fine.

21 THE COURT: Then you're not objecting?

22 MR. CANTOR: No, I'm not.

23 THE COURT: You're ready to go forward with your
24 argument --

25 MR. CANTOR: Yes.

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1 THE COURT: -- based on this charge?

2 MR. FRANKEL: Yes, Judge, based on this, yes.

3 THE COURT: Do you have any objection to the --
4 defendant -- on the charge?

5 MR. ARCHIBALD: No. Other than my previous arguments
6 on compensatory damages, no.

7 THE COURT: All right. Then come back in ten minutes
8 and we'll go forward with your argument.

9 MR. FRANKEL: Can we have ten of, Judge? Can I can
10 get to the men's room, Judge?

11 MR. CANTOR: He just said ten minutes.

12 MR. FRANKEL: Ten of? It's 15 minutes.

13 THE COURT: Get back in ten minutes. I can't keep the
14 jury through a long lunch hour. I don't know why you need an
15 hour and-a-half, but if you do, I'll give it to you.

16 (Recess.)

17 THE COURT: Bring our jury in.

18 Get yourself set up, please, if you can.

19 MR. FRANKEL: We were speaking about possibilities.

20 THE COURT: Bring in the jury, please.

21 (Jury enters.)

22 THE COURT: Now, you have heard all of evidence. In
23 this phase of the trial, the attorneys will try to assist you
24 in analyzing the evidence that you've heard. Plaintiff has the
25 burden of proof, so plaintiff will go first in arguing, and

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1 then the defendant will argue, and then the plaintiff will have
2 a brief rebuttal, and then I'll charge you and tell you what
3 the law is, and then you begin deliberations.

4 Now, what the attorneys say is not evidence. So this
5 will not be read back to you if you should want to hear it. Is
6 that clear?

7 JURORS: (All jurors answered affirmatively.)

8 THE COURT: The testimony, we will be able to send in
9 and we'll send in whatever documents that were introduced if
10 you'd like. If you want more, we can do that.

11 So we'll go right through the plaintiff's summation,
12 and we'll go to lunch, then we'll have the defendant and I
13 should be able to charge you, so that you can deliberate for a
14 half-an-hour or an hour before you go home, and then come in
15 tomorrow, which I assume will be required.

16 Proceed, please.

17 MR. FRANKEL: Thank you, Your Honor.

18 Good morning. We got to speak -- I got to speak early
19 on. The Judge will allot me ten minutes after Mr. Archibald
20 completes his summation, at which time I will address some of
21 the issues, but right now, you folks become the jury but also
22 the judges. You become the judges of the facts.

23 The Judge, after you hear our summations, the Judge
24 will tell you -- you folks run the show -- how you deliberate.
25 The process you want to follow is totally up to the 12 of you.

Summation - Frankel

1 The way in which you want to discuss things also, we will never
2 know what that is unless and until you send a question out to
3 the Court asking for either guidance, information or as His
4 Honor told you. So very soon after the Judge gives you his
5 instruction, pretty much he'll be sitting and waiting with us
6 until you tell us if you've reached a verdict and what that is.

7 But I should have begun by saying thank you, and I
8 mean that genuinely. Jury service is -- yes, it's a civic
9 responsibility, but it's a bit of an inconvenience, to say the
10 least, and this was the Fourth of July week in between. Most
11 people have plans. A lot of people take off of from work. The
12 kids are off from school. But you came every day. You
13 listened to everything we had to say, even if we were boring
14 you and you were hearing it over and over again. Thank for
15 your patience and particularly on behalf of Mr. and
16 Mrs. Mendez.

17 Niki Hernandez Adams, I will be referring to, if you
18 don't mind, as Mrs. Mendez or Niki Mendez, because it's easier
19 to get that out -- and Joshua -- but most importantly, Geronimo
20 Mendez.

21 His pictures are in evidence. I will show them to
22 you. The Judge will tell you sympathy, that's not to be
23 considered. That's not why the pictures are here. It puts a
24 person, a face with a name, because so far, you've heard a
25 million things about this little boy and if he was walking into

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1 the courtroom now, except for the pictures, you would have no
2 idea who he is or if he's the same person, but --

3 This is a very, very serious case. As you know, and
4 as you've heard, this is the one chance that Geronimo Mendez
5 and his family have to get something for his future, something
6 for what they've gone through so far and what they're going to
7 go through in the future, based upon what the witnesses have
8 told you, based upon the records and the reports -- and again,
9 anything I say is not evidence, and if I say something that you
10 think is inaccurate, by all means it's what you think and hear
11 governs, and you will be able to speak together and if it's not
12 clear, that's why this young lady takes the testimony and can
13 read back to you if needed.

14 But why are we here? We're here, it seems obvious.
15 We're here because that man, Mr. Kimpson, allowed poison to be
16 present in his facility in his 490 Macdonough Street, and he
17 knew it was there -- although we'll talk about certain aspects
18 of requirements of the law where he didn't have to know.

19 And as a result of his bringing these parents in and
20 other tenants to rent out the premises, that little boy who
21 otherwise had every opportunity in the world to have a normal
22 healthy life ended up where he will never be normal.

23 He has permanent brain damage. He has all sorts of
24 dysfunctional problems, cognitive deficits, behavioral issues,
25 biting other kids, hitting. And when the last witness for the

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1 defendant said, well, there's all sorts of interventions and
2 programs.

3 Do you think for one second that these parents are not
4 hopeful that those interventions will make a big difference?
5 But realistically, from what the doctors, including the
6 plaintiffs' -- the defendant's witnesses have said, there's
7 that not much of a great chance that this child's ever going to
8 have a normal healthy life, and the downside is so horrendous,
9 they don't even think about that.

10 But I've asked each one of the defendant's
11 witnesses -- they're doctors. They're neuro-psychs. They're
12 specialists -- about the Needleman survey and study with the
13 Center for Disease Control, and every one of them said that
14 children who are exposed to lead paint byproducts, dust, chips,
15 whatever -- at the earliest ages are prone to end up being
16 violent and aggressive later in life, and to criminal behavior.
17 Now, notwithstanding that their witnesses, not one of those
18 witnesses -- not Dr. Auciello, not the gentleman who just
19 testified, not Dr. Klein, who testified for them yesterday and
20 the day before -- not one of them said that that wasn't true.
21 Now, heaven, that's not going to be an issue, we don't know,
22 but it's possible. But what we do know is this child is never
23 going to have chances that he could have had.

24 First question is, obviously, for any jury and
25 especially I think most so in this case but in every case,

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1 credibility. Who do you believe? Who do you believe based
2 upon nothing that the lawyers or the Judge or anyone would say?

3 It's like every day in life. You go out to buy a
4 suit. You go out to buy a car. Somebody says, that's the
5 best-looking dress you have. Oh, you look terrific." And you
6 know they're trying to sell you or you think, hey, they're
7 being honest and maybe, you know, they're trying to help me.
8 That's credibility. Do you believe them or are you
9 comfortable?

10 And I submit that when we review the evidence together
11 now, you will recognize -- if you already haven't, and we
12 suspect you know already -- that this man is not only not
13 honest, he doesn't care one bit about --

14 MR. ARCHIBALD: Objection, Your Honor.

15 THE COURT: I'll permit the argument. The jury will
16 decide on credibility.

17 You will decide it. Do you understand that?

18 JURORS: (All answer affirmatively.)

19 MR. FRANKEL: Regulations and laws that he admits he's
20 violated don't seem to matter. So when he testifies and wants
21 you to believe certain things, you'll need to consider all of
22 those things.

23 During my first opportunity to speak with you, I said
24 there's ways to present cases and we're going to ask you just
25 to look at the evidence. And then when you have a strong case

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1 and you have a victim who's been hurt and the victim is hurt by
2 someone who did something wrong, terrible, you present the
3 evidence, as we have, and you push the evidence and push the
4 evidence -- and I know it took a long time, and I know some of
5 it was so repetitive, but we needed to get the documents in
6 evidence. The witnesses before you.

7 On the other hand, when you don't have a defensible
8 case and your client has done something that hurts somebody,
9 deeply seriously and permanently, distract. Red hearings is
10 something that was said recently by Mr. Archibald. Make sure
11 the jury does anything you can get them to do except pay
12 attention to the defendant to the evidence, because if you can
13 confuse them enough and get them thinking about all these other
14 things, then all of that good evidence you have that's
15 compelling, some or a bunch of the jurors might say, you know,
16 maybe there's something to that. Maybe we ought to consider
17 it. That's the job. That's the job. And in this case, as
18 much as if any case, it's been done and what are those things
19 now?

20 Indisputable evidence. The family moved into this
21 apartment because this was the dream. She was pregnant. She
22 was going to have a baby within three months. That were
23 excited. They asked Ms. Cosby for a garden apartment. This
24 was the one and Ms. Cosby -- honest woman, came in with no
25 agenda, testified truthfully. Again, it's always you who will

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1 decide -- but she is the real estate broker. She helped these
2 people. She knew what they wanted. She found this. They came
3 in. They saw it. And she said -- withdrawn.

4 Mr. Kimpson said when I asked him, long before Ms.
5 Cosby testify, well, you have known that Niki Mendez was
6 pregnant because she's a thin lady and she's six months, and
7 I'm sure they told you that, since there's nothing in the lease
8 that says you can't have kids or dogs, by the way. And he
9 said, I had no idea she was pregnant and nobody mentioned it to
10 me. Niki Mendez testified not only did we tell him I just had
11 my baby shower and I was sticking out like a medicine ball.

12 So now their witness, although she was -- again, up to
13 you -- an honesty, decent witness who testified. You'll decide
14 truthfully. She said not only was it obvious that she was
15 pregnant, she had had a conversation with Mr. Kimpson about why
16 these tenants were so eager for the garden apartment and why
17 it's such a nice place and that the pregnancy and the dogs,
18 which also were permitted, were the reasons they were so
19 excited about having this apartment, the garden apartment.

20 He testified before you, I had no idea she was
21 pregnant. But if she's allowed to have children there, why is
22 that? Because he believes that he's covered under some statute
23 that says, you only have to abate lead and get rid of it or
24 cover it if you think there are no small -- there either are
25 small children living there or you know there's a likelihood

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1 under certain circumstances. Why else? Do you think that Ms.
2 Cosby wasn't telling? That Micky wasn't telling the truth? So
3 that's one of the things that you need to consider,
4 respectfully.

5 Now, certain undisputable -- indisputable,
6 undisputable -- I apologize. I'm not sure. But the child
7 developed a 9 blood lead level when he was tested for his first
8 birthday, blood test. He only lived in that apartment. After
9 they discovered that, the pediatrician discovered that, they
10 had the apartment tested. The New York City -- that's the
11 regulation and I'll show you in a minute, if I can, the New
12 York City reports, they come in as soon as the pediatrician or
13 the laboratory -- I think the pediatrician, Dr. Frank said,
14 either they or the laboratory has to call. It's a legal
15 requirement, and then they come and they test and guess what?
16 They found lead.

17 Now, if you remember the gentleman who testified,
18 Mr. Eweke. He's the supervisor of the woman who took the test.
19 And they found lead in the apartment in -- I think there were
20 24 violations, but we'll go back to the report.

21 But what did he say that was really most significant?
22 They don't inspect with that machine that they're all saying
23 the machine is going through the wall. They don't inspect
24 until there's peeling and chipping paint that tests positive
25 for lead. And so he said that's how she was trained. That's

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1 how we're all trained and if she goes and there's paint peeling
2 or chipping, they don't do an inspection -- a further
3 inspection with the machine. So then she did do it, and found
4 24 -- I believe 23 or 24 violations.

5 That's solidly in the record. One more and I'll just
6 call them distractions or red hearings. You going to hear,
7 well it was through the wall and we had the guy and it wasn't
8 really anything. So any of this stuff that was there, they
9 were just using the machine wrong. And any of the stuff on the
10 ground and on the floor is because of the dogs, dogs, dogs,
11 dogs, dogs -- another red herring.

12 Indisputable, lead paint byproducts are toxic, are
13 poisonous and permanent. Not a single witness -- one of them I
14 think, well, maybe it could be, every one of the defendant's
15 witnesses as well as our witnesses said that's absolutely a
16 fact. Does permanent brain damage.

17 What else happens? It hides in the brain. It hides
18 in the bones and it hides in the tissues of the infant's body.
19 And it leeches out. So when Mr. Archibald asked the last
20 witness -- another red herring -- well, the blood count --
21 blood lead level went down and then it went up a little bit.
22 Doesn't that seem to indicate that in Dallas, they're living in
23 a place that has lead? Well, it's always possible.

24 But the second part of that, as our witnesses and his
25 witnesses testified and agreed is call leaching. It leaching

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1 out. It hides in the bones. And I believe it was either
2 Dr. Auciello -- I think was Dr. Auciello who said, well, the
3 witness who testified yesterday -- I apologize -- it never
4 leaves. It could be there for ten, 20, 30 years, but sooner or
5 later as it goes down, hopefully it's not a problem. But
6 damage done is damage done.

7 Mr. Kimpson will have you believe that he not didn't
8 know whether there was any lead in his building, in his
9 apartment, but he never heard of lead. He had no idea lead
10 could be an issue and more than that, he had no idea that lead
11 was a toxin poison that could do those things kind of things to
12 children.

13 Now, Mr. Kimpson has been a landlord for 20 years in
14 Bedford Stuyvesant area, where those beautiful brownstones are
15 like this one and in adjoining neighborhoods, and he's been
16 buying and selling buildings for those 20 years and renting
17 them out and that's from his testimony.

18 Now, at some point in a few minutes, I'm going to go
19 through the lead disclosure form, but if remember what Ms.
20 Cosby testified to, she said you have to always give that form
21 whether you're renting, whether you're buying. It's got to be
22 part of the package to the person who's buying, renting,
23 whether it's an apartment, whether it's a house. Even if it's
24 new, it's a law that that form has to be given to the people
25 even if you don't have kids.

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1 It could be a ninety-year-old couple moving in and
2 they're not going to have children. That form has to be part
3 of the package. And she said that's her training. It's a
4 requirement, and it's done every time. Not only she does it
5 every time, she was directed to do it every time, and
6 everyone who works in the industry does that to protect their
7 company, as well as to protect the people who are coming into
8 the apartments.

9 So you have a man who for 20 years has been buying and
10 selling these buildings, and he never saw the form and he never
11 heard about lead. And the question is for you, is that
12 believable? Is that possible? Well, I think in part, you have
13 to judge this by what other things that we know about Mr.
14 Kimpson and about this building.

15 Well, start out with he bought the building. And how
16 did he do his demolition and renovation? Pick up some guy off
17 the street with a bunch of other guys. Now, it's not that
18 people can't do the work and aren't handy, but he paid cash to
19 everybody.

20 He has no records. And I'll go through something
21 that's very important in that area. And he can't tell you the
22 last name of his contractor, anyone who worked for him, whether
23 the guy had a company, whether there were any permits -- which
24 would even include dumpsters because you can't just put a
25 dumpster on the street -- would include renovations. Didn't

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1 know any of that stuff.

2 And what's really, with all due respect, offensive is
3 he still claims and testified and has his witnesses testify he
4 did perfect lead paint encapsulation. Just got lucky. But he
5 admitted he never discussed it with the guy who was doing the
6 work. The guy with the work never said anything about it. He
7 never saw anything unusual being done. So he did everything
8 right just by luck, without knowing any of the dangers and in
9 addition to that, when all this lead show up later on, it's the
10 dogs.

11 So what's the most pressing part of that part of the
12 red herring? You'll hear in the Judge's instructions that one
13 of the questions you folks have to decide is first whether
14 Mr. Kimpson was liable, responsible, and if so, was the mother,
15 Micky Hernandez Adams, comparatively negligent or liable for
16 her son's sickness, injuries that he sustained as a result of
17 exposure to lead. Now, that's in the instruction, and I
18 believe you're going to hear Mr. Archibald speak about that.

19 Well, here's the question. Mr. Kimpson said, never
20 knew there was lead. Said in the form -- which we'll go
21 through -- no lead. Spoke in front of the couple as well as
22 Ms. Cosby. And so, now the dogs exposed lead and she's
23 responsible for her son being poisoned and having these
24 injuries and damages because the dogs are one whose brought
25 that lead paint out. Just think about that, please, with all

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1 due respect.

2 So when you read those questions, think about how in
3 the world could she be responsible? It would have been dust,
4 dirt, other paint -- not damaging, not toxic, not poison, but
5 still, they'll have you consider that.

6 Now, I guess the biggest part of what I call the
7 distractions or red hearings, you've heard it 20, 30 times.
8 Bilirubin jaundice, anesthesia and hydrocodone and otitis
9 media. Sounds pretty scary -- and these are the reasons four
10 of his witnesses -- the defendant's witnesses -- projected that
11 it wasn't lead, but it could have been any one or a combination
12 of these things that caused the problem for this child.

13 So I asked each one of them the standard -- and you
14 have heard all the witnesses testify in their specialities --
15 within a reasonable degree of medical certainty, whether a
16 reasonable degree of economics certainty. I asked each one of
17 them, Dr. Auciello, Dr. Klein -- can you say with any
18 reasonable degree of medical certainty that any of these things
19 did any harm to this little boy? And they say, well, it's
20 possible. The studies show -- because if they get you thinking
21 about bilirubin and they get you thinking about otitis media,
22 you're not going to think about the fact that the pediatrician
23 testified here, Dr. Frank, the person who knew better than
24 anybody else.

25 Did you not find her credible? We subpoenaed her to

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1 come here. But did she not testify about what she did and each
2 one of these conditions? Did she not seem like a very
3 competent, very involved, very concerned doctor? And she put
4 to rest every one of those things. Gone. Not an issue. Why?
5 Because we took her to the hospital. I met the specialist at
6 Long Island College Hospital. They put him under the lamp.
7 They waited 'til his bilirubin numbers went down. He was no
8 longer yellow he came home.

9 But every witness that Mr. Archibald put on the stand,
10 what could otitis media, what could bilirubin elevated have
11 done to this child? And they talk about permanent brain damage
12 and how it could do -- and here's what I'll ask you to
13 consider, if you will. When Mr. Archibald does his
14 presentation in the summation, I have asked each one of those
15 witnesses and in your mind, let's hear what he tells you about
16 one single entry in one pediatrician's record, in a medical
17 record, in a therapist's record, in a speech counselor's record
18 that indicates this child had any hearing problem? So he's
19 going to say and project it very well the otitis media is the
20 reason that this child has speech problems, because he can't
21 hear properly. That's the reason, or one of.

22 Now, if I may, (Perusing documents.)

23 There are certain things in the transcripts that I
24 think are important to point out and you may know a lot of this
25 and so I apologize if I say something or I read something in

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1 that's, yeah, we know that already. It's too important to take
2 a chance on the job that Mr. Cantor and I have to do to
3 represent this family and this child. So, again, forgive me if
4 I go too far.

5 But at page 277, Dr. Troast, if you remember the
6 gentleman long time ago. That's the other issue. Some of
7 these witnesses from eight, nine days ago, and who could expect
8 you to remember everything? But maybe it will ring a chord.

9 He was with the EPA, and he talked about -- he's a
10 toxicologist, and he was asked by me about certain things
11 that -- in the EPA files and at the CDC.

12 Page 277, line 25: "Doctor, in terms of the CDC and
13 EPA, what were their findings from the studies with regard to
14 what parts of the body in an infant can be affected by exposure
15 to lead under ten?" And by the way, nine is under ten, but
16 it's pretty close.

17 Answer: "Primarily, you're looking at the neurologic,
18 the brain and the transmission of messages to the brain. So
19 they will impact the ability of the cognitive development of
20 child."

21 "And what does that mean in layman's terms, please?"

22 Answer: "The child won't develop fully and mature and
23 become a mature citizen, recognizing potentiality --
24 potentially" -- I'm sorry -- "how to interact in a population,
25 how to develop, how to get a job."

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1 Bottom of page 278, line 25: "I'm sorry. Please
2 continue. The various organs of the body?"

3 Answer, top of page 29, line two: "Lead will impact
4 all external organs, not just the brain. It will deposit in
5 the teeth. It will deposit in the bone. It will deposit in
6 soft tissue organs, such as the liver and the kidney, and have
7 significant toxicological impacts in those organs."

8 Bottom of page 279, line 20. "Well, aside from the IQ
9 decline" -- answer. I'm sorry. Answer: "Aside from the IQ
10 decline, the U. S. EPA published in 2013 an integrated science
11 assessment with a linked exposure to causation of certain
12 effects and one of those effects was ADHD, and externalizing
13 and internalizing behavioral changes with exposure to lead."

14 Question: "Anything other than that in terms of
15 potential acting out, violent behavior, focused?"

16 Answer: "They covered that under externalizing. That
17 was covered under their description of externalizing behavior."

18 And then I asked him -- and I don't have to read it --
19 why sometimes a lead level goes down and then it spikes, and he
20 explained also at page 280 and 281 about how it leaches back
21 into the blood because it hides in the soft tissue organs and
22 in the bone.

23 And the question about a threshold where some of the
24 defendant's witnesses said, well, it used to be ten and he only
25 has a nine. Well, they lowered it to five.

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1 From his -- from the CDC, he testified at page 284 --
2 I'm sorry. 284, the question at line 6: "And what do you base
3 that upon, these other things?"

4 Answer: "I base that upon the fact that we have
5 published data which shows there is no threshold level for
6 lead. There is no safe level." And then he goes on to explain
7 where that comes from.

8 Finally, his opinion at page 285, I asked him, 285,
9 line 15: "Have you reviewed the records from
10 neuropsychological tests?"

11 Answer: "I did look them over."

12 Question: "Yes? And the determination as to what
13 deficits Geronimo is suffering and other behavioral issues?"

14 Answer: "Yes."

15 Question: "Can you, Dr. Troast, testify" -- and
16 here's the key -- "to a reasonable degree of toxicological and
17 scientific certainty that the exposure this child suffered in
18 the first year of his life is the reason or proximate cause for
19 his issues now as a four year old -- almost a four year old?"

20 Answer, top of page 286: "Yes. There's no doubt,
21 based upon toxicological certainty, that the exposure he's
22 accumulated by living in that residence for the first year
23 resulted in blood lead of 9 micrograms per deciliter of blood
24 lead. I look at the record and I saw no other source of lead
25 in the environment he was subjected to." And then he goes on

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1 to talk about the water was tested, the air was tested and
2 there was no issue of lead in either of those.

3 Now, Dr. Gordon testified, if you recall -- he's also
4 from NYU, as Dr. Auciello had also practiced there as well --
5 and they talk about stuff, both of them. It was somewhat
6 technical for all of us. And what are some of the exams they
7 were trying to evaluate? One is communication. Obviously, we
8 know expressive language, expressive language skills and
9 receptive skills. Second one is daily living. The third,
10 community skills. Four, socialization skills and five, motor
11 skills.

12 Today and some day recently one of the defense
13 witnesses both testified, he wasn't accepted in Dallas for the
14 program because he didn't meet the standards, and therefore,
15 you know, he's not that bad off, you know, he's doing pretty
16 well.

17 Well, both neuropsychologists, including Dr. Auciello
18 who testified for the defendant, said these are his deficits.
19 These are his issues. And when a child is going to go to a
20 school, whether it's a public school, private school, smaller
21 school -- if he won't sit still and he won't pay attention and
22 he won't listen and worse, he's punching, pushing and biting or
23 kids, does it really matter whether he meets the criteria to
24 get free services from a state in the south? Is that going to
25 make a big difference to him?

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1 Now, the IQ of both doctors at -- withdrawn.

2 Dr. Gordon told you that his first test was 87 when
3 the child was two years, eight months and then it was 65 when
4 the child was three years, eight months. And I said to him,
5 that doesn't make sense. Nobody loses that many IQ points.
6 And he said, oh, no. I don't think his IQ is 65 or anywhere
7 near that. I think it's probably 75 to 80. But so how do
8 account for that? Because if he won't respond to the test and
9 you try to ease him into it and he doesn't answer the questions
10 or he becomes a little belligerent or pulls away, you still
11 have to grade the test. You can't grade it on anticipating,
12 but you take all that into consideration.

13 So when Dr. Auciello testified and Mr. Archibald said,
14 well, you know that it was -- he said 65. Did you know that's
15 ridiculous. It can't be. And so of course, he didn't mention
16 to him that when Dr. Gordon had testified here, as he told you,
17 it's not 65. It's not 87. It's somewhere in between. But
18 that's very low, at best, low normal. And very -- and even
19 under the best of circumstances without behavioral issues, they
20 testified, he's not likely to go very far in school.

21 Yeah, I'm sure there are exceptions. But someone with
22 a 75 or 80 IQ and then you add the behavioral issues, what are
23 the chances that this child's ever going to get through a
24 normal high school? And Dr. Gordon said, probably it's kind of
25 a special school. He's going to have to have not a real high

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1 school. He's going to have to have one of the special studies
2 high schools. And the chances of him ever going to a college
3 of any -- any proper college of any significance is not going
4 to happen. Sorry. Excuse me.

5 In his opinion, Dr. Gordon testified again that it's
6 permanent. All the damage has been done. And you can't expect
7 that anything's ever going to improve in terms of his brain
8 damage.

9 Now, let's get back to Mr. Kimpson, if we can for a
10 minute, and I'll try to -- if you could all -- the jurors can
11 excuse me for a second.

12 I'm sorry, Judge. I thought the other one is on.
13 This one doesn't seem to be --

14 THE COURT: Would you get up and take care of it?
15 There's a switch on the side.

16 MR. FRANKEL: I thought so.

17 THE COURT: You can show it on the --

18 MR. FRANKEL: I know, the other one. Will be couple
19 exhibits in evidence.

20 THE COURT: All right.

21 MR. FRANKEL: I'm sorry. We have one. I apologize,
22 but obviously. Let me know if -- moving it one way or the
23 other, now, unless we get the other one going, most of you can
24 see that? (Exhibit published.)

25 This is Exhibit 3 in evidence. This is -- let me see

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1 if I can zoom a little bit. Okay. Now, if I remember, this is
2 the form that Ms. Cosby brought to the rental with the lease
3 and if you remember her the testimony, she said that she put
4 this down, and the first thing she said, she asked Mr. Kimpson
5 to take a look at this and he said, I don't know anything about
6 lead.

7 And right here, there are the initials. Mr. Kimpson's
8 testified those are not his initials. He doesn't know how they
9 got there. She testify, Ms. Cosby, those are his initials. I
10 saw him put them there. I was standing next to him.

11 And more than that, that's when they had the
12 conversation with the Mendez couple that he's not aware of any
13 lead, and so the subject never came up again. I asked her, did
14 she say anything to you about, gee, a man 20 years he's a
15 landlord. He doesn't know anything about lead? Did he say
16 what's this form? What's he talking about? Lead -- lead
17 warning statement is a federal statute. We'll go down to
18 lessor. That's him. The landlord, his disclosure. He didn't
19 say a word. He just initialed, yeah, there's no lead. It's
20 okay.

21 So unfortunately, that was the worse thing that could
22 ever happen to the Mendez family and to this little boy,
23 because they were confident. They didn't know anything about
24 lead. There was no issue. He said it's not around issue.

25 And Mr. Kimpson also testified the pamphlet was given

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1 to them by Natalie Cosby. Well, he also testified he never
2 heard of the pamphlet before. He didn't know there was a
3 pamphlet. But he now remembers, Ms. Cosby testified, I gave
4 them the pamphlet, but it was inside a packet, so I never took
5 it out and I never talked to them about it. They didn't ask
6 any questions. But Mr. Kimpson remembers, I saw her give the
7 couple that pamphlet.

8 But even if it had happened, which with all due
9 respect, why would Ms. Cosby lie about something like that, he
10 said there's no lead. So anything you read is interesting.
11 It's educational, but if there's no lead, it's not your problem
12 and who better than the landlord?

13 And I asked Ms. Cosby, when he made that
14 representation, was there any feeling that you didn't believe
15 him or trust him? She said no. Would there be any reason why
16 the Mendez family wouldn't trust him or about be comfortable
17 with his representation? She said no. And yet, comparative
18 negligence, when the dog scratched the molding, so they say,
19 and that's the reason and she should be held responsible for
20 his son being poisoned.

21 Now, the agency acknowledgment. She issued initialed
22 and she told us -- I'm blocking it -- "Agent has informed the
23 lessor of the lessor's obligations under 42 USC, United States
24 Code, Section 4862(d), and is aware of his or her
25 responsibility to ensure compliance."

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1 Part of that's the pamphlet and part of that is to
2 know your property and the possibilities of lead, and why
3 that's important because everyone who testified, including Ms.
4 Cosby about the property and the engineers, any property built
5 before 1960 has a presumption of lead-based paint and it's not
6 a defense for this man to say, but I didn't know, because the
7 statute doesn't require that he know. It requires only that
8 there's a presumption. He's got to find out. He's got to
9 inspect and we'll go --

10 MR. ARCHIBALD: Your Honor, I object. The law should
11 be left to Your Honor to instruct the jury on and that's what
12 this defense -- rather plaintiff's counsel is doing at this
13 point.

14 THE COURT: You may continue.

15 I'll tell you what the law is later.

16 You may continue your argument.

17 MR. FRANKEL: Now, the other thing is, if you see at
18 the bottom, Ms. Mendez said they signed there. Above where the
19 agent signed, they signed "lessor," which is not where they
20 should have signed. That's not Mr. Kimpson's signature.
21 That's the couple. And then it was dated. And then they left
22 and they were happy as could be that they were going to have
23 this dream apartment that they had been looking for.

24 And again, just so it's clear, and you can judge also
25 from your own experiences, when you rent an apartment, when you

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1 buy a house, when you buy an apartment, there's always a lead
2 disclosure form. That's part of what's done. It's a city law
3 as well as obviously it's a federal law, but apparently not for
4 Mr. Kimpson over the last 20 years.

5 Now, I won't go through Dr. Gordon's neuro-psych
6 exams, but I will, if I can, read to you --

7 THE COURT: Before you do that, Mr. Frankel, would you
8 put something on the board there, so the technician can check?

9 MR. FRANKEL: Thank you.

10 THE COURT: Put that on, please.

11 MR. FRANKEL: Oh, I'm sorry. (Complies.)

12 THE COURT: Okay. Thank you very much.

13 MR. FRANKEL: Okay. For so for future documents, we
14 should light until we get back to that.

15 Now, Dr. Gordon's opinion at page 360, line 14,
16 answer: "Well, attention and memory and behavior functions are
17 the function for learning academics and relating to peers and
18 benefiting from school. So it would have a significant impact
19 and often executive functioning problems get more prevalent as
20 a child gets older, particularly in junior high school. The
21 executive functioning demands great" -- I'm sorry -- "demands
22 get stronger as the child goes on in school."

23 Line 21: "How about socialization?"

24 "Again, attention and memory have a major impact and
25 frustration tolerance have a major impact on relating to peers

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1 and picking up cues or handling conflicts and problems in
2 relationships."

3 Page 361, "In your training, Doctor" -- I'm sorry,
4 line eight, "your education and the studies that you have
5 continued to review, does it talk about -- do they talk about
6 or address the possibility of aggressive behavior later in life
7 for a child like Geronimo, as you evaluated him?"

8 Answer: "Yes."

9 Line 14: "And what is that?"

10 "There's a higher risk for antisocial and delinquent
11 aggressive behavior as a result of lead poisoning."

12 Question: "And you have read those studies as
13 recently as how long ago?"

14 Answer. "Over the last couple of weeks."

15 And then he says, "To a reasonable degree of medical
16 certainty," page 362, his opinion, line three, "it's with a
17 high degree of neuropsychological certainty that his problems
18 in attention and working memory and executive functioning and
19 behavioral self-regulation are causally related to his high
20 level of lead poisoning."

21 And then line seven: "Doctor, what is your prognosis,
22 assuming the child gets the same type of positive aggressive
23 intervention with speech therapy, things of that nature, that
24 this child will be able to attend a regular high school program
25 when he's at the appropriate age?"

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1 Answer: "He'll need some special education services,
2 such as occupational therapy, speech therapy and counseling to
3 do well in school."

4 Question: "In your opinion, what is the likelihood he
5 could attend a four year college and graduate?"

6 Answer: "That would be very unlikely."

7 Last witness who testified said that not only is this
8 child capable of going to a four year college and graduating,
9 he could probably get a Master's degree. With all due respect,
10 have you seen anything in this trial from any of the doctors
11 and medical people that lead you to think that that evaluation
12 is an accurate one?

13 Now, if I could go back to Mr. Kimpson for a minute,
14 because once again, you're going to hear from Mr. Archibald
15 that Mr. Kimpson didn't know anything about lead and therefore,
16 he's not responsible because luckily -- he won't say luckily --
17 he encapsulated properly, followed the rules and therefore, he
18 didn't expose this child to lead poisoning.

19 Now, how honorable and how honest is Mr. Kimpson?
20 First, we have the fact that he testified before you that he
21 certainly had no idea that she was pregnant, although she not
22 only looked pregnant, she said she told him and she was proud
23 of it and talked about it, but again, Ms. Cosby said
24 absolutely, she was glowing. She was happy. She was looking
25 forward to it.

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1 So he knew that not only was there going to be a baby
2 in that apartment, there was going to be a newborn baby and
3 they did home birth. And it just for a second, speaking about
4 Niki Mendez, we may not agree with some of the things she
5 chose, like home birth, not inoculating your children, and
6 those are choices they made. We may think those are poor
7 choices. The doctors, certainly her own doctor said, every
8 time they came, I said, you ought to do it. You ought to do
9 it. You ought to do it. And you'll hear that again I guess
10 because you've heard it about six or seven times from
11 Mr. Archibald.

12 There's nowhere in the record anywhere at age four,
13 where this child had suffered anything relating to any of those
14 things, the inoculations, immunizations, would have covered,
15 which doesn't mean it's not a good idea, but the factor that it
16 is one of the reasons why he's suffering some of the deficits
17 that he's suffering, one more red hearing, one more
18 distraction. Oh, it's one of those things. He wasn't
19 immunized. Maybe that's the reason.

20 But I tried to get Mr. Kimpson to focus on the
21 demolition of the apartment before they moved in. And then the
22 reconstruction and he was talking about he said full demo.
23 Full demo. Everything went. I took out everything. The base
24 floor might have still been there. I don't recall. And I
25 covered it with drywall, a coat of primer, two coats of paint,

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1 and then his experts came in and they say, perfect
2 encapsulation. He did what was required under the law, under
3 the regulations. But his experts came in 2015, this year. The
4 Mendez family moved out in August and in September of 2012. So
5 the question I asked and I would ask you to ask -- excuse me
6 one second. I'm just wondering if I could get one exhibit.

7 (Publishes exhibit.)

8 I'll take two exhibits, Defendant's Exhibit 0-5 and
9 0-3. If could you start with 0-5.

10 So Brian Flynn testified, the PE, and he said this is
11 consistent with dogs scratching, and it's clearly dogs biting
12 and dogs scratching. So Mr. Flynn was hired, and took the
13 photographs in February I think 2015, this year.

14 So here's the question that came to our minds
15 initially. Child gets lead poisoning. Doctors come back with
16 the report. The New York City comes in, they test. Lead.
17 Mr. Kimpson hires his own lead experts. They come in. Lead.
18 The wipes who came, that young fellow with the T-shirt who came
19 and testified. I guess he hasn't been in court a lot, but and
20 the judge was very decent and didn't say ask him why he
21 wouldn't -- didn't you know you're coming to court?

22 But in any event, he testified and then the supervisor
23 of the lab came and testified about the wipes. Three tests
24 were done, one of which was people Mr. Kimpson hired, and they
25 all found lead in September 2012. That's just before they

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1 moved out.

2 So now, 2012, Mr. Kimpson knows this child's been lead
3 poisoned. His explanation as it's been all along is the dogs
4 scratched and the dogs scratched and the dogs scratched and
5 she's responsible because she should have stopped it.

6 So first question, why didn't you take pictures in
7 September or October 2012? That's the first question. Second
8 question, the lawsuit in this case was filed in 2013. So let
9 there be any question in Mr. Kimpson's mind, he's being sued
10 for a lot of money for some serious stuff that happened to this
11 little baby. No photographs from 2013. What could that
12 possibly mean? Instead, we have photographs from 2015. So
13 that's one set of questions.

14 The second question is, Mr. Kimpson testified that
15 after the Mendez family moved out, a woman, a single woman
16 moved in. And she then had a baby while she was living in the
17 apartment. So she lived there for over a year, he said.

18 Now, I don't know about you, and again, it's your
19 decision, but when you move into an apartment and you're paying
20 17, \$1800 a month, and it's partly because of the pristine
21 woodwork and molding and all that, you wouldn't say to the
22 landlord, you're kidding. You think I'm going to move in and
23 you're going to leave it like that? And I'm going to move in
24 and pay this kind of rent?

25 I'm not going to show you all the photos, but the

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1 other photo is Defendant's 0-5 and again, I'm not
2 representing -- again, it's not my speciality. Sort of looks
3 like it was sanded in places, but, again, the tenant moves in,
4 paying considerable rent and she don't say to Mr. Kimpson,
5 Mr. Kimpson, you got to do something to paint it over, scrape
6 it, do something. No. She lived through it and it went on to
7 live for three more years, so that his expert could take a
8 picture and tell you it looks to me like it happened in 2012.
9 Even Houdini couldn't testify to something like that.

10 But here's something that we never would have known,
11 but it's with all due respect frightening, the defendant called
12 Mr. Arthur Morales as one of his witnesses, and he was a lead
13 paint specialist and determined he did testing.

14 Again, he did testing in 2015. And he said that
15 there's lead behind the walls, the theory of what they're
16 telling you, and that's not uncommon and -- but I asked
17 Mr. Morales, could you tell us what the situation was three
18 years before, in 2012? He said no. How could I possibly know
19 that? But of course then you can get the pictures and then you
20 can say there's lead behind the walls.

21 But I asked him because he said that he saw the
22 scratches and other thing, and it was pretty badly scratched
23 and I asked him, did you take any lead readings from the
24 moldings like this? And he said, yes.

25 And I said, Mr. Morales, you said you got some

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1 possible -- this is page 944, paragraph -- I'm sorry, line
2 eight and nine and ten: "You said you got some positive
3 readings from lead on the moldings?"

4 He said, answer: "On the painted moldings."

5 In 2015, after that woman had lived there for a year
6 with her baby, it was still on the moldings. And guess what?
7 The two dogs were living in Dallas. How did that happen?
8 Because he didn't care even in 2015, because all you have to do
9 is scrape it or cover it completely, but obviously, it wasn't
10 worth spending the money, and he testified he recently sold the
11 building this year, within a few months of all this happening.

12 And I asked Mr. Morales, line 14, same page: "Yes,
13 the scratched ones did not did not test positive for lead. But
14 the painted ones that were covered did test positive for lead?"

15 Answer: "The painted ones did."

16 Question: "You're not talking about behind the wall
17 again. You're talking about the moldings?"

18 Answer: "We're talking about the moldings."

19 Question: "Did you know that there was or did you
20 know that there was or did Mr. Kimpson tell you that another
21 tenant had moved in and had a baby while living in that
22 apartment?"

23 Answer: "No."

24 So that's one thing that just brought something to
25 mind. I'm sorry to jump around. I just want to make sure I

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1 get everything in and don't take too much more of your time,
2 because we have to talk about damages and other parts of the
3 verdict sheet.

4 But, Dr. Auciello seems like a bright guy. He came in
5 and he testified as the defense neuropsychologist, and he
6 testified as consistent, bilirubin could be a problem.
7 Jaundice could be a problem. Otitis could be a problem.
8 Anesthesia could be a problem. This could be a problem. That
9 could be a problem.

10 And he said, we don't know, but I can't say. He's not
11 a doctor and he couldn't say anyway to a reasonable degree of
12 medical certainty. And then I said to him, because he said the
13 more information -- which makes sense -- that a witness or a
14 doctor has, the better it is and the more prepared he'd be and
15 better his opinion would be.

16 So I said to him, well, you mentioned all these
17 possibilities. Did Mr. Archibald, who you said you spoke with
18 the other night, tell you that the pediatrician, Dr. Rachel
19 Frank, who took care of the little boy for all 12 months had
20 testified? And he said no. Did you know she testified and I
21 asked her about every one of these issues, the bilirubin, the
22 anesthesia, the jaundice, and she explained how they treated it
23 and why and she even said, well the thing on his head was not a
24 problem. It's not as one of the witnesses said the other day,
25 who's treated a hundred thousand children, Dr. Klein, she said

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1 no and it resolved, which it always does and we always watch
2 it.

3 But I said she had testified that when there was a
4 heart murmur, she thought it could potentially be serious, even
5 though they didn't think it was. They sent the baby with the
6 mother and father to a pediatric cardiologist. It's in the
7 file. It's in her medical records. Came back. No problem, no
8 issue. Resolved. They were satisfied.

9 Careful. They're in Park Slope. You know the kind of
10 clientele you have in Park Slope that doesn't --

11 MR. ARCHIBALD: Objection, Your Honor. I said
12 clientele.

13 THE COURT: Read that back for me.

14 (Record read.)

15 THE COURT: Well, strike the Park Slope or the
16 clientele. Go on from there without the Park Slope.

17 MR. FRANKEL: I withdraw it, Judge.

18 But you evaluated -- you will evaluate the credibility
19 and what appears to be the ability as a pediatrician of
20 Dr. Rachel Frank.

21 And so, Dr. Auciello, I asked him, well, you spoke
22 with Mr. Archibald after she testified, that she addressed
23 every one of these issues, that they been raising and they told
24 you about to include in your report with concerns, don't you
25 think it would have been helpful, Dr. Auciello, had you been

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1 told that she addressed these and how she addressed them? He
2 said, absolutely. The important information the better,
3 honest.

4 So I said now that you take for as given, that she as
5 the pediatrician and her partner, never thought any of these
6 things were serious issues, never saw anything complex,
7 anything that came out of this, any injuries to the child, any
8 other problems. Could that perhaps change your testimony? He
9 said, I have to hear it, but I might.

10 So now, what does that tell us? It tells us that
11 they're concerned that if Dr. Auciello is honest and honorable
12 and has an opinion, you can't tell him something and risk he
13 might say, oh, I'm not going to testify about that. The
14 pediatrician did and she took care of that all.

15 MR. ARCHIBALD: Objection, Your Honor.

16 THE DEFENDANT: Maybe he would not have testified.

17 THE COURT: Excuse me. Don't speculate on what the
18 attorneys did, please. They're not on trial.

19 MR. FRANKEL: But he did say, that certainly, in any
20 event, it would have been a helpful. It would have been
21 something he certainly would have considered, and I mean,
22 common sense, I mean a lot of this stuff. I apologize. I'm
23 beating a lot of this stuff and I shouldn't be, but common
24 sense, you're a doctor. You make a decision. You come with an
25 opinion and you find someone withheld something that could be

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1 beneficial, that could be helpful in your opinion, but they
2 withheld it from their own witnesses.

3 MR. ARCHIBALD: Objection, again, Your Honor. He's
4 saying exactly the same thing you just told him not to do.

5 THE COURT: Just strike that last statement, please.

6 MR. FRANKEL: And also, Mr. Flynn testified that he
7 didn't know that there had been another tenant who had lived in
8 the apartment for over a year. So when he testified about the
9 condition in 2015, he didn't know that 13, 14 months, a woman
10 with a baby had lived in that apartment. They didn't tell him
11 either.

12 So open, truthful, candid evidence, red herrings,
13 evidence, distractions, but less there be any question -- if
14 you recall, I had asked Mr. Kimpson to bring in any of the
15 documents which from -- I'm sorry from the demolition or
16 reconstruction.

17 So he said, first asked him about money he paid in
18 cash for all the workers. Now, listen, sometimes people, you
19 have some work done in your house. You have a tile -- a new
20 roof or you have maybe a plumber come in and put a sink in.
21 You give him cash. Happens. Nobody makes a big deal.

22 But \$75,000 was his testimony, \$75,000, he paid these
23 guys off the street in cash. Why? He had no receipts. He
24 doesn't know their name and he certainly didn't comply with the
25 IRS and New York State regulations and filing --

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1 MR. ARCHIBALD: Objection Your Honor.

2 MR. FRANKEL: It's his testimony, Your Honor.

3 THE COURT: Well, there's regulations with respect to
4 records.

5 You may continue your argument.

6 MR. FRANKEL: So, how does he feel about following the
7 law and regulations? But, wait a minute. I'm sorry. Excuse
8 me one second. I apologize.

9 Perhaps one of the things that is as strong as any of
10 the others about Mr. Kimpson's believability or lack of
11 believability is when I had asked him about having any
12 documents to pay -- showing you paid the workers and all he --
13 and he said no. I said and you don't have any documents to
14 show the work that was done in terms of supplies, so we could
15 see whether all those materials that went into demolition and
16 reconstruction were actually used.

17 Because after all, as you sit here today, we have no
18 idea if any of that stuff was done. When the people who
19 testified on his behalf said it was good encapsulation, that
20 was in 2015. We had no one testifying other than it looked
21 pristine and it's lovely. Yes. All that's true, but that has
22 nothing to do with lead exposure and problems that it caused.

23 But I asked him, so you don't have any documents,
24 credit card statements, canceled checks, invoices from Home
25 Depot and he said, yes, I think I have them at home. So His

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1 Honor directed him to go home and bring those records in the
2 next day.

3 Now, at page 76 of the transcript with Mr. Kimpson
4 under oath still, The Court, His Honor asked, line 19: "Did
5 you have any records, sir?" Withdrawn. I'm sorry. Line 17 by
6 me: "There was an issue of Mr. Kimpson bringing in his
7 records, Your Honor. You directed him yesterday."

8 Line 19, His Honor: Did you have any records, sir?
9 Take this stand, please." Mr. Kimpson goes back to the stand.

10 The Court: "Do you have any records, sir?"

11 The witness: "No, sir. The records got damaged in
12 the flood that I had. I thought I had records in the
13 basement."

14 The court, top of page 77: "You have not one piece of
15 paper, is that correct?"

16 The witness: "No, sir."

17 His Honor: "Am I correct when I say you have not
18 piece of paper available showing any anything with respect to
19 the cost of building, the cost of repairs or anything else,
20 correct?"

21 The witness "The cost of the building?"

22 The Court: The cost of encapsulation and your other
23 repairs?"

24 The witness: "No. I thought I had the receipts, but
25 the receipts, I had them in a shoebox in the basement and they

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1 all got damaged, and they got thrown away."

2 The Court: "So you don't have a single sheet of
3 paper?"

4 The witness: "No, sir."

5 The Court: "Is that right?"

6 The witness: "Yes, sir."

7 Now, this is addressing His Honor.

8 First off, take this in perspective. He's doing his
9 repairs, demolition. He said it was a major job, in addition
10 to \$75,000 in money to the workers and for tax purposes you can
11 write off things you get, gains against expenses and things,
12 and now, he didn't do that in 2011, January. If he had them in
13 a shoebox in the basement. Then, 2012, he says he had a flood.
14 The suit in this case was 2013. The lawsuit again was filed
15 and he was served.

16 So now we has a lawyer. So you got to produce
17 documents, show the work that was done, convince people you did
18 the right thing and it was honorable, and you did your
19 encapsulation. No thought of that at all, never happened.

20 Doesn't say at any time the documents were destroyed
21 in a flood, that it was in a shoe box in the basement. Nobody
22 hears that. It's not written anywhere. His lawyer in this
23 case just produced an insurance statement showing that there
24 had been a flood in the basement.

25 So now, he comes to court, and I asked him for the

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1 records. And His Honor directs him to come back with the
2 records and that he says, I think I have them at home. And
3 he'd have you believe that the first time he looked and
4 realized that the records had been destroyed in the flood and
5 he didn't have any was when he came back to court here during
6 this trial.

7 With all due respect ladies and gentlemen, it's
8 ludicrous, absolutely ludicrous and what does it tell you about
9 this man and about how little he cared about the little boy and
10 the family and what he really cared about? And following rules
11 and regulations and the law is nothing not of any significance
12 to him at all.

13 Now, I just want to show you before we get onto
14 damages, just quickly just showing you the three inspection
15 reports. First one is, Plaintiff's Exhibit 5. I won't go
16 through it. It's a large document, but at least, I think that
17 once we get -- yeah, thank you for fixing -- for fixing for
18 getting that one going, as well. I'm going to put it back a
19 little.

20 (Exhibit published to the jury.)

21 MR. FRANKEL: This is in evidence, again, Plaintiff's
22 Exhibit 5. Commissioner of Health Order to Remediate and it's
23 addressed to Mr. Kimpson and at his home address with regard to
24 the apartment at 490 Macdonough Street, basement apartment, and
25 it talks about the violations and it's signed by the director

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1 and it says within five days, he has to -- with the health
2 code. I'm sorry. Health -- pursuant to Health Code 173.14E 1,
3 et cetera, et cetera, within five days of completing all work,
4 copies of the work that was done, and just above that the
5 therefore, if you look at all the sections that were violated
6 that had to be remediated.

7 Now, I won't go through the whole thing again. It
8 talks about the report itself. This is the actual inspection
9 report. And again, if you recall, Mr. Eweke testified that
10 this is what the worker, Ms. Yulery (phonetic), who was on
11 vacation from what I hear, had done when he did the inspection
12 of the premises, which again, she would not have started doing
13 if there wasn't peeling and chipping paint.

14 So it's in the record. You need to do that. I won't
15 go through all the other things. There were letters coming
16 back and forth from New York City. And it's from the New York
17 City Department of Health and Mental Hygiene, Lead Poisoning
18 Prevention Program. That's the first one. The second one,
19 Plaintiff's Exhibit 4 in evidence is from Citywide Lead
20 Removal, Inc. This is a company.

21 (Continued on the next page.)

22

23

24

25

Summation - Frankel

1 (In open court.)

2 MR. FRANKEL: This is a company that Mr. Kimpson hired
3 to do an inspection for lead, after the city found positive,
4 perhaps hoping maybe they would say the city was wrong, that
5 they didn't do the test correctly, which you might hear again
6 about the equipment and the city didn't know how to use it
7 correctly, and it talks about testing and tells what they used.
8 And this is important. Again, Exhibit 4 in evidence, because
9 it shows all of the -- let me see if I can zoom in a little.
10 Oops. Too far.

11 All of the places his inspectors investigated and
12 where they found levels where it says positive or negative. I
13 don't know how easy it is to read it, but you have it with you
14 in the jury room if you would like. And it talks about all the
15 places, including not just door frames and not molding only.

16 It shows some negatives but it also shows, if you look
17 at the last entries towards the bottom, closets. So maybe the
18 dogs were just going into the closets and scraping paint off
19 the closets. We didn't get that from Mr. Kimpson.

20 So when you go through this report as well you will
21 see that his own testing folks found lead everywhere in the
22 apartment, not just in one room. It's in the living room and
23 it was in the hall and it was in the, I guess, private hallway,
24 and then in the foyer. It was everywhere.

25 The third report is from -- this is the letter, if you

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1 remember, from young Mr. Strulovitch, who came in and testified
2 from his company about doing the wipes. We have copies of the
3 results, which we will have before you. I won't take the time
4 now, but seven of the 14 wipes came back positive for lead.
5 Why is that significant? The wipes were all done on the
6 floors, not molding, different places on the floor throughout
7 the apartment; and they found seven out of 14 were positive
8 above the acceptable lead level.

9 When the witness, the woman, Ms. Kogan, testified --
10 and it was a little hard to understand some of what she said --
11 but what she testified is the procedure, it's FedEx'd, it's
12 kept, here is the chain of custody, here is what they do. You
13 are probably going to hear why it's unreliable, we don't know
14 who actually did it in the lab, whatever.

15 But then go back to Mr. Morales, because Mr. Morales,
16 in addition to testifying about finding lead-based paint still
17 on parts of the molding, also his company does wipes, lead
18 paint wipes; and he said -- I asked him what's your procedure.
19 I take them, we put them in the tube, we number them, we put
20 them in a bag, and we sent it by FedEx. I said, oh, to New
21 Jersey? He said, no. Our testing company is in Michigan, but
22 they are very reliable. So that's the practice in the
23 industry, and it's gone on for every, and these three exhibits
24 are in evidence as well.

25 Now, I would like to move on to damages. His Honor is

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1 going to give you the law, and nothing any lawyer says or
2 anyone else is admissible as any explanation. You will be
3 asked to go to the verdict sheet after you hear his instruction
4 and consider what it is you need to determine.

5 Now, the reason I just want to read from the verdict
6 sheet is to make sure it's not confusing, not that I expect it
7 will be, but if you are in any way concerned or not certain,
8 you will ask the judge how to do something.

9 With the first count, New York City Childhood Lead
10 Poisoning Prevention Act. Now, under the act there are several
11 subdivisions. You will see each one of them. It's a code
12 number. For example, code -- the first one, code Section
13 27-2056.3, reads, "owner's responsibility to remediate."

14 MR. ARCHIBALD: Objection, your Honor. He can't be
15 reading the law to the jury.

16 THE COURT: Excuse me. I will let him argue, of
17 course.

18 MR. FRANKEL: That's one of the many sections, but
19 look in that section. It doesn't say that the owner has to
20 have actual knowledge of lead-based paint in his facility, in
21 his apartment. And then in another very important one is the
22 one we spoke about that you heard from Ms. Cosby when she
23 testified. It's 27-2056.5.a, Presumption: In any multiple
24 dwelling -- and three apartments constitutes a multiple
25 dwelling; that's not an issue -- erected prior to 1960 --

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1 that's also not an issue -- it shall be presumed that the paint
2 or other similar surface coating material in any dwelling unit
3 where a child of applicable age resides or in a common area is
4 lead-based paint. There you are, the presumption part of this
5 statute, as to why Mr. Kimpson was not truthful about the
6 pregnancy of Niki Mendez, because if he read this he might
7 think that a child of applicable age resides and will reside.
8 They are pretty clear, you are renting. So all of a sudden he
9 felt the need to not be truthful to you.

10 I won't go on to read the others, except one more.
11 Right under that, it's just called "Violation in a Dwelling
12 Unit Upon Turnover," and that's the 2056.8.a. There is no way
13 to follow this until you actually get it and read it, and it
14 talks about, again, an apartment in a building built after --
15 before 1960 where you turn over the apartment, your obligations
16 to remediate the lead, to do an inspection, to notify people,
17 and to make sure that when you turn it over it's a safe place.

18 So that's one set of statutes, and the important thing
19 is where the jury -- the verdict sheet says it's just part one,
20 did the defendant violate the New York City Childhood Lead
21 Poisoning Prevention Act? You are asked to decide yes or no.
22 That's any of the provisions. It doesn't have to be all of
23 them.

24 Of course, you have to have a unanimous vote to decide
25 anything. It doesn't matter what it is you are voting on

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1 throughout any of the things the judge gives you. It's got to
2 be all 12 of you, and if you need it, then you answer the
3 question yes or no. In this case, as you go through it, please
4 recall the charge, which talks about all the different aspects
5 of that statute.

6 Now, the second one is the one that I -- I'm sorry.
7 Was the defendant in violation of the statute, a substantial
8 factor in causing the child plaintiff's cognitive and
9 behavioral injuries? Again, a yes or no is requested.

10 Third one: Was the plaintiff mother negligent, yes or
11 no? And I think again you are going to hear if those dogs
12 hadn't scraped away the molding, this child would have never
13 been sick. It was his parents' fault. They should never let
14 that happen, but Mr. Kimpson said there was no lead. Yeah,
15 there could have been dust on the floor, there could have been
16 paint. It's not going to give the kid lead poisoning, brain
17 damage, all these other things.

18 You can't have it both ways. You say there is no
19 lead, you can't blame them for poisoning their child. That's
20 what you did.

21 Next question was: Was the mother's negligence a
22 substantial factor in causing the child plaintiff's cognitive
23 and behavioral injuries, yes or no? And then you are asked to
24 pick a percentage, if you have answered yes to Mr. Kimpson
25 and/or the mother, the percentage of responsibility or

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1 culpability.

2 The second count is the Federal Residential Lead Paint
3 Hazard Reduction Act, and it talks about several things; and
4 the first question: Did they violate the act, and the judge
5 will read it to you. I'm not going to do that.

6 Second question is if you answer no then you move past
7 that; but if you answer yes, was the defendant's violation of
8 the statute a substantial factor in causing the child
9 plaintiff's cognitive and behavioral injuries. Then they ask
10 again about the mother's responsibility and goes on to was it a
11 substantial factor causing cognitive, behavioral injuries; and
12 it goes on to the apportion and percentage.

13 But if I could just say this with number two, if you
14 remember, again -- I know I have said this before, but I have
15 been talking a lot and I apologize, but it needs to be done --
16 that Ms. Cosby said she never took out the pamphlet and gave it
17 to them, but it was there in the packet. So when Mr. Kimpson
18 said no lead -- and he knew full well there was lead, and I
19 believe you are going to make that determination yourself for
20 all the reasons we have discussed, not just his dishonesty but
21 his ownership of buildings for 20 years -- but if they read the
22 pamphlet, having heard there could possibly be even -- I don't
23 know if there is lead or not. I have no knowledge of any lead.
24 I don't know if there is lead.

25 You saw Niki Mendez. She would have read the booklet

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1 and come back possibly, and then say what's with the lead. You
2 know there is no lead, was it tested. She was given assurance,
3 her husband was given assurance. It's not there. So you don't
4 have to worry about it. So if they got home and read the
5 booklet, if the booklet was really in the packet, they wouldn't
6 have known. So this is interesting, lead problems in some
7 people. Anyway.

8 The next is the breach of: Did the defendant breach
9 section 235B of New York Real Property Law? The judge will
10 charge you as to what that is. And then you will be asked if
11 you find that Mr. Kimpson was responsible or liable for the
12 damages, at least in part, if not wholly, to this child.

13 You have to make a determination, and the judge will
14 give you all the categories -- and I'm not going to read them;
15 they are self-explanatory -- and you will be able to decide how
16 many years going forward, how many years he will suffer, how
17 many years he might be entitled to damages, and then same
18 questions with regard to his mother, a little bit different,
19 about her medical expenses for her child, up to what age, up to
20 18, and emotional damages for her, which is page 7 of 7,
21 compensatory damages awarded to Mrs. Hernandez-Adams.

22 What emotional damages is Mrs. Hernandez-Adams
23 entitled to, if any, from the date of her son's diagnosis
24 throughout the period of time she is expected to live; and then
25 it goes on for the values and the awards.

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1 So I believe you will have no problem going through it
2 and making the decisions that you think are appropriate, but
3 I -- just one more thing -- excuse me a second.

4 (Pause.)

5 MR. FRANKEL: Just a few minutes, I promise.

6 Now, this forgive me when I speak sideways. This
7 exhibit is also in evidence as Plaintiff's Exhibit 31. It
8 was -- remember Dr. Frank Tinari, the gentleman with the bow
9 tie? He brought the charts and explained. Again, you will
10 determine whether he or the Dr. Lentz who was here is telling
11 you what you believe is appropriate. You will make the
12 determination.

13 With all due respect, he's got the numbers and he has
14 explained why, and he told you why these numbers are important
15 and how they work. He did change his position slightly based
16 upon, one, the rate of growth of the economy had slowed and
17 also based upon certain statistics on a model.

18 You will hear this Spizman thing over and over and
19 over. You will hear that again too. It's just a guy -- their
20 own witness said Spizman is important but he is just one of the
21 guys. They will have you believe if Spizman says it, it's the
22 word from above. So let's see what you hear about Spizman
23 because that's going to be another red herring.

24 Anyway, this is the report from doctor -- I'm sorry --
25 Tinari, and if you see the category he is going for the age the

Summation - Frankel

1 child and life expectancy statistically to age 76 and the
2 components of his analysis, the adjusted pre-impairment
3 earnings, adjusted post-impairment earnings, and cost of
4 lifetime care. This, as the judge explained -- and we will
5 get, I'm sure, his charge -- talks about present value. You
6 don't talk about numbers without bringing them to what's
7 supposed to be present value. You will start at the top. It
8 says education and earnings scenarios. The first one is
9 pre-impairment.

10 Now, I believe counsel misspoke before when his
11 witness was on the stand. It's your recollection that governs.
12 Dr. Tinari did not say that he is likely to get a professional
13 license. He said it's less than -- it's less likely -- it's
14 than likely, it's more unlikely than likely, had he not been
15 injured, had he not been poisoned with lead; and he did say
16 that he would have likely did achieve a master's degree.

17 Again, this is where your life will come into play.
18 Let me give you the numbers under that, if I can for now. So
19 while I'm speaking to you, you can at least look at, and he
20 gives you the breakdown.

21 Now, whether or not if your parents have a college
22 education is it or is it not more likely they are going to push
23 you on to get a college education, and maybe even go farther,
24 to get a master's degree; and if your mother has a master's
25 degree, even if it's in costume design, these people believe in

Summation - Frankel

1 education.

2 (Continued on the next page.)

3 o o o

4 Certified to be a true and accurate transcript.

5 /s/ Michele Nardone

6 MICHELE NARDONE, CSR, RPR, CRR -- Official Court Reporter

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MICHELE NARDONE, CSR, RPR, CRR -- Official Court Reporter

Summation - Frankel

1 (In open court.)

2 MR. FRANKEL: You can be a costume designer without
3 having a masters degree if you're good at it, I'm sure. But
4 anyway.

5 So you'll determine from your life, your loved ones,
6 and your neighbors whether you think that their experts who
7 said, Oh, he could go, you know. On even now with all of his
8 disabilities, he could go on and get a masters degree and
9 graduate from a good college. And remember what Dr. Auciello
10 said, 75 to 80 IQ those kids, unless they're extraordinary,
11 don't get through college. Very rare. Anyway.

12 So there's the numbers for the masters degree and his
13 age in the labor force, possible professional degree.

14 Now, here at Page 3 is the pre-impairment lifetime
15 earnings, and it's broken down by the number of years through
16 to 74. And you see again: Masters degree or professional
17 degree and, again, he said it's "less likely." Doesn't mean
18 it's impossible, but he even said less likely than a masters
19 degree which is relatively likely, moderately high likely. I
20 believe he used high moderate, high normal, and likely. So a
21 masters degree would not be a surprise.

22 Now, pre-adjustment, pre-impairment adjusted earnings,
23 and it talks about masters degree scenario, 19,322,000. It's a
24 lot of money, but if you take it over how many years, when you
25 have a four-year-old, if he's going to work to be 60 something

Summation - Frankel

1 or 70 breaks down into not a lot of money each year
2 comparatively. We're not talking about earning 200,000 a year.
3 We're talking about, with a degree like that, and the numbers
4 and they're all here. Of course, the scenario for
5 professional, degree the would have adjusted loss would have
6 been 30 million but they're talking about the masters is 19
7 million. On Page 5, he gives you the breakdown, let me just
8 start at the top.

9 Adjusted pre-impairment lifetime earnings for a
10 masters degree, and he breaks down from 2035 when the child
11 would likely attain a masters telling had he not been impaired
12 and poisoned all through the 2080, that's a long time away, but
13 he's four years old August 1st and he gives you the categories:
14 Wages based years, gross earnings, and then the adjusted
15 earnings and what that comes to.

16 Even their expert, although I believe that Dr. Reagles
17 said something around 3 million in lost earnings. Their expert
18 said 1.3, 1.4 based on a different category.

19 Now, they're not conceding that Mr. Kimpson did
20 anything wrong, but in the event that you find that he did,
21 they come up with numbers over a million. We don't agree with
22 them, Dr. Tinari did not agree with them, and does not agree
23 with them and you have these figures to look at and to
24 consider.

25 And the yearly increase, future years, is 3.8. Their

Summation - Frankel

1 witness said 3.0, and if you need their various testimonies
2 that'll be available. And this is post-impairment adjusted
3 earnings, and it shows you the percentage based upon various
4 things -- fringe, adjusted earning factors, work life
5 expectancy, reduced earning capacity. And, in the bottom, just
6 with a GED, post-impairment 4,285,101. So that's the
7 difference if he gets a GED.

8 And lifetime care this talks about the numbers going
9 through the years, the component, the percentages. Now,
10 whether or not some physician services will be covered and all
11 of that the judge will instruct you. Again, he's already told
12 you once or twice about how to consider that and he will again
13 during his instruction. And the number that is listed is
14 425,588.

15 And then there's periodic evaluations and then here's
16 the summary. Here's the summary with a masters degree had he
17 been able to attain that. That's the adjusted pre-impairment
18 earnings of the future and the post-impairment you see the
19 number with the cost of lifetime care and with a number
20 15,462,742.

21 Excuse me one second.

22 I just want to -- I have not mentioned the negligence,
23 excuse me, I'm sorry.

24 (A brief pause in the proceedings was held.)

25 MR. FRANKEL: I omitted to mention that one of the

Summation - Frankel

1 causes of action is for negligence and the judge will, of
2 course, instruct you as to what negligence is and whether or
3 not it caused the injuries to young GMM. And I believe, with
4 all due respect, at this point, having learned as you have
5 about what is in the records you should not have much
6 difficulty but I don't mean that with any disrespect.

7 It's evidence, evidence, evidence. The evidence from
8 the doctors, the evidence from the medical reports, the
9 evidence from the neuropsychologists. The evidence from the
10 lead, from three tests including Mr. Kimpson's all of the
11 evidence.

12 Now, in damages, there's pain and suffering, there's
13 compensatory damages. Judge Weinstein will tell you what could
14 constitute compensatory damages which is as it sounds to
15 compensate. But then there's also the question, I mean, lost
16 earnings as you've seen, pain and suffering, emotional pain and
17 suffering, but punitive damages will be charged.

18 Now, what are punitive damages. Judge Weinstein will
19 tell you what the standard is. It applies in the case where
20 somebody does things basically egregious, serious, a bad wrong.
21 This is such a case, ladies and gentlemen because had he told
22 them the truth, or had he done what he should have done, this
23 child -- we wouldn't be here today and they'd probably be
24 living in New York and this child would be a healthy, normal
25 baby and a healthy, normal 4-year-old and that's never going to

Summation - Frankel

1 happen and that's not a red herring or a distraction.

2 All the other stuff that you're going to hear again,
3 please, again I ask you remember I only get ten minutes after
4 lunch after we have an opportunity to listen to Mr. Archibald.
5 Answer the questions in your mind if you can and think about
6 what it is that you might think for those things like the dogs
7 did it, like, all the bilirubin stuff, and why are you hearing
8 that again.

9 Why aren't you hearing about evidence. Why is she
10 being blamed for the dogs disrupting lead that shouldn't have
11 been there, that legally wasn't allowed to be there, that is
12 presumed to have been there, and that he told them isn't there.
13 And yet, without the dogs, the dogs, the dogs.

14 And then the other questions are is somebody trying to
15 fool you. If you think in any way we've tried to fool you, I
16 don't believe that you're going to make that determination at
17 all. But 2015 photographs, not telling some of your own
18 witnesses things that happened in court so that they could
19 perhaps adjust their testimony if they think it's appropriate,
20 and the records that were in the basement and telling the judge
21 that they're still there at home. When he was going to check
22 it only for the first time in this court last week realized,
23 oh, they were destroyed. If you can do that, and you cannot
24 have a single record to show what you did, what demolition was
25 done, what reconstruction was done.

Summation - Frankel

1 The only word you have and the only word his experts
2 had was Mr. Kimpson's words. Oh, he said that he put up the
3 walls and he did this and not a single document and not even a
4 worker, and not even a friend who came in to help during the
5 course of that. Every witness who testified about going 2015
6 it was done correctly. When you hear "encapsulation," wait
7 until you hear from Mr. Archibald who tells you who else other
8 than in 2015 sought, testified about it, provided any
9 documents. Provided any information.

10 Now, money. You heard from Plaintiff's 24, 25, and 26
11 are the only way you're ever going to personally, as close to
12 personally, meet GMM. Handsome kid, looks perfectly normal.
13 Because of what this man did to him, he's never going to have a
14 normal life. Doesn't matter how he looks, doesn't matter what
15 his parents do, it's always going to be struggle and they'll
16 pray for the best. Fortunately for him, he has wonderful
17 parents, and a little sister, and they're going to do
18 everything they can. And all the doctors said that other than
19 how own, well, he didn't take him for occupational therapy.
20 They didn't have insurance, they don't have money, they told
21 you that. As soon as it comes in, they're going to go.

22 And the neuropsychologists both said Dr. Auciello
23 she's a very involved, loving, caring mother. And the last
24 thing I asked her was, realistically, you know from what these
25 people have testified to that your child is never going to be

Summation - Frankel

1 anywhere near normal and he's going to suffer. That she said,
2 We're optimistic. We're never going to give up. We're going
3 to fight him.

4 I'm sorry. Forgive me.

5 So, ladies and gentlemen, you have to decide on
6 numbers and the judge will give you the form to decide how much
7 is her suffering worth to raise a child that got poisoned for
8 no reason except that's what he does, and truth doesn't matter,
9 and caring about kids doesn't matter. And when you think about
10 punitive damages, think about the other woman who moved in
11 without a child and then gave birth to a child.

12 THE COURT: Excuse me. Stop.

13 MR. FRANKEL: I'm finished.

14 THE COURT: Don't consider that.

15 MR. FRANKEL: How much money --

16 THE COURT: Excuse me. Occupation in connection with
17 punitive damages.

18 Punitive damages, if you give them at all, are to be
19 based on what happened up to the time she left. Plaintiff left
20 not thereafter.

21 MR. FRANKEL: I'm going to finish now, Judge.

22 When you talk about millions of dollars, and it sounds
23 like a ridiculous amount of money, it certainly doesn't in this
24 case. And to these people you look at the lost earnings, those
25 are numbers that are easier to look at because you have the

Summation - Frankel

1 charts. But is the pain and suffering of this child present
2 and future and past worthwhile? How many millions of dollars?
3 Don't think it's worth that much money? It's not going to make
4 him normal but give him a chance at life in the future to live
5 better, to go for all the therapy. If he doesn't have a decent
6 job, or maybe no job and can't graduate even high school
7 possibly he can still survive. How many millions? 2 million,
8 3 million. How about the mother's pain and suffering? Heaven
9 forbid any of us are in that position.

10 THE COURT: I don't want you to mention specific
11 amounts, strike that.

12 Don't mention specific amounts except as they're in
13 the record based upon the expert's statements.

14 MR. FRANKEL: We just ask that when you consider the
15 numbers that you try to equate what happened here, why it
16 happened, how it happened, and how avoidable it's been and it
17 isn't.

18 And you know that this woman and her husband, the
19 parents of this child, would pay ten times that amount of money
20 if they had to to make sure he was normal for the rest of his
21 liver and that's never going to happen. Thank you.

22 THE COURT: All right. Thank you. Be back at 20 to
23 3:00. Don't discuss the case.

24 (Jury exits courtroom at 1:41 p.m.)

25 THE COURT: Thank you.

G.M.M. v. Kimpson

1 MR. ARCHIBALD: Thank you.

2 MR. FRANKEL: Thank you.

3 (Luncheon recess taken at 1:41 p.m.)

4 (Continued on the next page.)

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G.M.M. v. Kimpson

1 A F T E R N O O N S E S S I O N

2 (In open court.)

3 (Parties present.)

4 THE COURT: Are you ready?

5 MR. ARCHIBALD: I'm prepared, your Honor.

6 THE COURT: All right. We'll start as soon as the
7 jury comes in.

8 (A brief pause in the proceedings was held.)

9 THE COURT: We should have a list of the witnesses
10 that the parties can make up and a list of the documents.11 MR. FRANKEL: I think your clerk was one of the
12 exhibits, the Enviro-Probe. I want to give him one of the
13 exhibits. That is all except the Enviro-Probe.

14 COURTROOM DEPUTY: Jury entering.

15 (Jury enters courtroom at 2:47 p.m.)

16 THE COURT: Be seated. Proceed, please.

17 MR. ARCHIBALD: Good afternoon.

18 THE JURY: (Collectively) Good afternoon.

19 MR. ARCHIBALD: Well, this is the part of the trial
20 that you get to hear from me, and this is the last time you're
21 going to get to hear from me because I don't get a chance to
22 come back when Mr. Frankel comes back on rebuttal. So anything
23 he says at that point in time I can't respond. So, to assist,
24 I'm going to do my best to try and anticipate what he's going
25 to say.

Summation - Archibald

1 Now, one of the things that he did, and he did a very
2 good job at is thanking you, and I'm going to do the same thing
3 because it's not easy to put your lives on hold it be here.
4 And we all decided this is the country we love whether we were
5 born here or not but we live here, and part of living in this
6 country is jury service. And some people like to do things to
7 get out of it but you guys didn't and that's appreciated.

8 So on behalf of the Court, Judge Weinstein, my client,
9 Mr. Kimpson, and the plaintiffs we want to thank you for your
10 service. It's greatly appreciated. Because without you we
11 can't do our jobs, so we thank you and appreciate the fact that
12 you are helping us do what we're supposed to do.

13 Now, remember when in my closing, or rather, in my
14 opening statement I gave you a few scenarios. And I said to
15 you, well, I want you to suspend your judgment, right? I want
16 you to wait until you hear everything, and then make your
17 decision. I don't want you to do like the folks that listen to
18 that Orson Wells program did back in the '30s and make rash
19 decisions because they thought something was going to happen.

20 I also told you about one my favorite movies
21 "Goodfellas," the 1990 Martin Scorsese film, and I told you in
22 that film the person that had the greatest performance wasn't a
23 big star, wasn't Robert DeNiro was Joe Pesci and he won an
24 award that year, and I told you to look out for the Joe Pescis
25 in this case. Because there would be Joe Pescis. And didn't

Summation - Archibald

1 you see Joe Pesci, Mr. Eweke. He testified, he had an amazing
2 performance.

3 I asked him on seven occasions whether or not the XRF
4 device sees through the Sheetrock like my expert testified to
5 and he obfuscated and he wiggled like when you put salt on a
6 worm and it wiggles and it contorts. That's what he did, but
7 at the end of day he had to answer my question because he said,
8 yeah, he's experienced and he knows this. He said absolutely
9 and that's in the transcript.

10 Now, those three binders is the transcript. That's my
11 copy of it, but the Court will provide you with a copy of
12 anybody's testimony there's been quite a bit of testimony.
13 Somewhat a little technical, somewhat a little exciting, some
14 was not so exciting. But there's quite a bit of testimony and
15 you're entitled to get a read back of anybody's testimony.
16 Anybody. Whether it was an expert, whether it was a plaintiff,
17 whether it was the young man Mr. Strulovitch or anybody you are
18 entitled to see that and you can.

19 Now, in these types of cases we got two issues to
20 decide. The first issue you need to decide is what we call
21 "liability," meaning, who is at fault. And then if you
22 determine that anybody's at fault then you might need to do
23 what is called, "an apportionment," and Judge Weinstein will
24 wet into the intricate details of the law with you on that.

25 And then there's damages, and damages means, Okay, if

Summation - Archibald

1 this person's responsible then what's the value of it? And we
2 had very learned experts, right? That went to very impressive
3 schools, that did appropriate analyses to determine what the
4 value of this would be, and we'll get into that later as well.

5 And at the end of the day, if you did what you swore
6 that you would do, and you all did it, there would be one
7 inescapable conclusion here. And that is, my client,
8 Mr. Kimpson, is not responsible for this infant. And remember
9 the judge told you already, and several times he's told you,
10 that sympathy and emotionalism, those are not the things that
11 you're going to use to make the determination here. You're
12 going to look at the facts and then you're going to take those
13 facts and the law that the judge is going to give you. You're
14 going to synthesize them and you're going to make an
15 appropriate decision. So you don't see any emotionalism coming
16 from this side because it's not. I'm going to tell you what's
17 involved here.

18 Now, we both made opening statements, and the judge
19 told you that what we said in opening statement is not
20 evidence. And I agreed with that because that's the law;
21 however, we tell you what we believe the evidence would show,
22 right? Let me tell you some of the things my opponent said the
23 evidence would show.

24 First thing he says. He claims that the evidence
25 would show that the baby was born at home healthy with no side

Summation - Archibald

1 effects. Three days later, went to the doctor for the first
2 visit; no issues. That's what he said the evidence would show.

3 Now, we all know that's not correct, right, that's not
4 what the evidence showed. The evidence showed that the child
5 had a birth canal injury. Cephalohematoma, pool of blood to
6 the side of his head. And you heard Dr. Klein yesterday,
7 right? Pediatrician, very good pedigree, where he went to
8 school, the amount of patient he has seen. Remember he says
9 seen in his 35 years he has seen over what? 10,000; 30,000
10 because he saw so many patients with all sorts of
11 presentations. And he said the reason why that bleeding occurs
12 is when the child is coming through the birth canal, there is a
13 fracture that happens to the skull that causes the blood to
14 seep out and pool. He told you that. So, right there, what my
15 good colleague, Mr. Frankel, said is going to prove that there
16 was no issues that's not correct, is it, right? The evidence
17 didn't show that. Says when they went to the doctor three days
18 later, no issues. We all know that is absolutely untrue,
19 right? The child had elevated bilirubin. You heard what that
20 does to the child. And you heard Dr. Klein tell, you know
21 what, when children are born in the hospital and they are
22 monitored that's taken care of immediately the same day.
23 Because the higher the bilirubin elevates, the more damage it
24 can do neurologically to the brain.

25 He says there's no evidence of that. You better

Summation - Archibald

1 believe there is. What's the evidence? I'll tell you what the
2 evidence is: The child was lethargic. Remember he discussed
3 lethargy. And when we asked him to describe what lethargy. He
4 says that's when the brain is having difficulty, it's slowing
5 down, you're getting tired, you're listless, you're sleeping.
6 And he used a very fancy term, he said, somnolence, remember?
7 Because the child is sleeping and won't wake up. And that's
8 why the child was losing weight because if you're sleeping and
9 you won't wake up you're not feeding. And if you're not
10 needing as a newborn, you will lose weight.

11 What did the evidence show? The child lost ten
12 percent of its body weight. Dr. Klein told you that that was
13 significant, right? That was significant.

14 So the evidence clearly showed that the child was born
15 with difficulties from the get-go. From coming through the
16 birth canal to the point at which he had to go get therapy.

17 Then we also learned that, yeah, he had to be
18 hospitalized, and you heard their Dr. Frank said it was an
19 emergency, we had to get that child to the hospital immediately
20 for treatment. The mom testified initially that it was only
21 eight hours, it was no big deal. It was actually 18 hours
22 worth of phototherapy and IV hydration. And Dr. Klein told you
23 that, yeah, the longer the period of time that you're under the
24 lamp suggests the longer the bilirubin is in the system and the
25 more damage it's doing.

Summation - Archibald

1 So if the child had eight hours versus 18, that would
2 be a difference, wouldn't it? It certainly would. Was he able
3 to testify that, yeah, well, long-term whatever effects this
4 bilirubin may have had on the child in its first day or two of
5 life that could come back later to cause deficits, he said
6 that. We don't know how high that bilirubin went, do we? We
7 don't know if it was at 20, if it was at 30 during those first
8 three days. And he testified that the peak spiking period is
9 72 hours. That was a day before the child went to the doctor
10 for the first time.

11 So you got to consider that, right? That's part of
12 the matrix here to make a decision and a determination, well,
13 wait a minute, maybe this will be a problem. So that's one
14 thing that they claim the evidence would prove, didn't.

15 Next thing he said that the evidence will prove that
16 Mr. Kimpson failed to give the lead paint pamphlet. The
17 evidence didn't prove that. It showed that she did get the
18 pamphlet. It's because it was Mr. Kimpson's agent. That's
19 easy, everybody knows that. He gave her the listing to rent
20 the apartment, she brought the Mendez family in, and that's how
21 the connection was made. The agent give it to him, gave it to
22 her, rather, so she got the pamphlet. Did the evidence then
23 prove that he didn't do it, of course not. The evidence shows
24 quite the opposite.

25 Now, there was some mixup about, well, did he sign

Summation - Archibald

1 this, did he initial this, did he -- you know what the evidence
2 showed about that, right? That their client signed where my
3 client should have signed. So my client never signed that, so
4 he was telling the truth when he said he didn't sign it. But
5 as you hear the testimony of Ms. Cosby and had you made the
6 decision, you know what, Mr. Kimpson really didn't do this, or
7 he really didn't do this, you'd be making a rush judgment,
8 wouldn't you? You'd be rushing to judgment because you
9 wouldn't have heard everything. Now that you heard everything
10 you can say, a-ha, now I can see how that comes together.
11 Mr. Kimpson wasn't lying Mr. Kimpson was correct when he says
12 he didn't sign it. So he was telling the truth, right.

13 Then another claim was that, you know, nobody, no
14 doctor, no expert would be able to testify that the choices
15 made by this mother to not vaccinate or not inoculate this
16 child. The CDC have any effect, nothing, it was okay what she
17 did. That's not what the evidence showed. Dr. Klein testified
18 yesterday, right? He's a pediatrician, he's versed in this
19 area. He said, yeah, the vaccine this child didn't give covers
20 a strain of infections, and one of those otitis media and I
21 could link the otitis media for the lack of reception of those
22 vaccines.

23 There is no evidence from the plaintiff's side to
24 controvert Dr. Klein, none. So the evidence showed the
25 opposite whether he claimed there would be no evidence that the

Summation - Archibald

1 vaccination caused anything. There was evidence to the
2 contrary and you got to think about that. Think how important
3 that is. Think about the otitis media and, yeah, he said, I'm
4 going to say otitis media and I'm not going to give him the
5 satisfaction.

6 I'll tell you this. Otitis media, nobody was able to
7 testify to the contrary, is an infection of the ear, fluid.
8 And what's important about that fluid is the consistency of it,
9 right. Both doctors agreed on that. Dr. Frank said so and so
10 did Dr. Klein and on Dr. Frank's report which is all we had to
11 go on there is no mention of an examination; there is no
12 mention of her findings. She said whatever she wanted to say
13 on the stand, but a doctor has certain responsibility to put
14 things in the record. She said, "I didn't."

15 You got to think about that in determining how much
16 credit you're going to give the testimony that she gave,
17 whether or not that makes sense. Whether or not that is
18 credible. You're going to have to decide that.

19 Another thing she didn't do is, well, remember when
20 she said she called the hospital to keep track of what was
21 going on. You all heard that testimony. But then when I asked
22 her, Did you make any notation of that in your file because
23 that would be important. What she said was she checked the
24 levels. But she checked the levels, she said she checked the
25 levels before asking the follow-up question. When I asked her

Summation - Archibald

1 the follow-up question, she was caught between a rock and a
2 hard place that she had to admit, I didn't put it in the
3 record. Then I asked her, Isn't that important? Isn't that
4 something that should have been put in the record? She had to
5 say yes. Why didn't you put it in the record Dr. Frank? I
6 don't know. Wasn't in her record.

7 You also heard yesterday with regard to the
8 vaccinations from Dr. Klein there's a vaccination schedule.
9 And you heard from the plaintiff's mouth that, yeah, every time
10 I went to the doctor, I signed a waiver. And why did you sign
11 a waiver? Because the doctor wouldn't see me if I didn't.
12 They wouldn't continue the relationship because that was their
13 protection that if something happened to this child and he
14 wasn't receiving vaccinations they couldn't come back and sue
15 Dr. Glasser and Dr. Frank.

16 So every time she signed a waiver and in the record
17 itself, "Parent refused to take vaccine." "Parent refused to
18 take vaccine." And went on and on and on. But yet, in the
19 vaccination schedule, they claimed that, wait a minute, we gave
20 this vaccine and this vaccine and this vaccine. And then when
21 we compared the vaccination schedule to the diagnosis that was
22 written out, they didn't match. Is that a problem? I think
23 so. Their recordkeeping was less than accurate.

24 What else then is less than accurate? The bilirubin
25 levels while in the hospital that wasn't clocked. The otitis

Summation - Archibald

1 media examination that wasn't clocked. And that's important
2 because depending on the consistency of the fluids in the ear
3 that arise from the ear infection determines the course of
4 treatment. It determines how serious it is. And thereafter,
5 nowhere in the record is there any mention that any treatment
6 was given and you heard Dr. Klein what he said. You want to
7 treat that with antibiotics to make sure that it's cleared up
8 because as we all know now if you can't hear properly, you will
9 have difficulty with speech and language; and thus, some of the
10 problems that this young man is experiencing, right?

11 Nowhere in his record do you see anything about him
12 going to an audiologist, and that's the only person who could
13 make that appropriate diagnosis. No audiologist. Is that
14 something you should consider. Absolutely.

15 Now, in his opening statement he also claimed that the
16 parents gave the child every conceivable type of therapy. They
17 did everything, they were great parents. Evidence didn't show
18 that, did it? They certainly did not.

19 For example, they got a referral from their doctor to
20 take the child for occupational therapy and they chose not to.
21 You heard what Dr. Kincaid said. That goes to mitigation, that
22 goes to help the child. Every single expert said the child
23 would benefit from that. They chose not to take the child.

24 You got to think about that and ask yourself: What
25 kind of parent wouldn't want to give their child every

Summation - Archibald

1 conceivable opportunity to do better?

2 Dr. Walters also recommended that they take
3 multivitamins with iron. Why? That helps in the treatment of
4 a child with lead in their blood. There's no question about
5 that. And the father even admitted, you know what, we can do
6 better. We can do better. His words, "We can do better."

7 Now, because the blood levels had elevated when the
8 child was in Dallas, they gave their doctor an opportunity to
9 think about, well, something is still not right here. You
10 should check the environment, do an assessment of your current
11 home. Let's make sure the child isn't being reexposed. Is
12 that something you'd want to do? I would think so. Does that
13 go to mitigation. I would say yes. Dr. Kincaid testified to
14 that.

15 You need to ask yourself: Why didn't she do it? What
16 was the motivation? Wouldn't you want to do everything to make
17 sure that this child is getting everything conceivable? You
18 need to ask yourself that question. And the judge is going to
19 tell you and instruct you on the law as it relates to
20 mitigation; that if you have an injury as a plaintiff, you have
21 to do certain things. And the judge will explain that in great
22 detail to you, but I just want to touch on it so you have a
23 roadmap to what's to come to assist you in a very serious
24 deliberation that you're going to undertake shortly.

25 Then we had the construction, and I want to go back to

Summation - Archibald

1 the Joe Pesci of our case confirms the construction.

2 Now, my colleague witness you to believe that there
3 are no pictures here. There are in pictures of how the place
4 looked back in 2012 or 2011. On the contrary, there is. There
5 is a picture. The picture that was painted by the gentleman
6 that took the stand, Mr. Eweke from the Department of Health in
7 his report, or the report that he is now espousing to be a
8 proper report. Remember when I had him read the comments
9 section, what did it say, "Walls intact. Ceiling intact.
10 Floor intact. Windows proper."

11 He was telling you everything that Mr. Kimpson and
12 Mr. Flynn told you about, right? In this exhibit, I hope you
13 can all see it, Mr. Flynn wrote down everything that
14 Mr. Kimpson told him, right? My colleague wants you to believe
15 that Mr. Kimpson told him nothing but lies. Nothing but lies.
16 But remember what this guy said with all his experience. He's
17 done over 700 of these, right? He knows what a freshly painted
18 surface looks like versus one that maybe was done five or six
19 years ago.

20 Now, he tried to get cute with my witness and asked
21 him if there was a date stamp on it. Of course, there's no
22 date stamp. That's ridiculous, right? But common sense would
23 tell you that if this person is an expert and he goes and he
24 looks at properties each and every day he has certain knowledge
25 after awhile. He didn't say it was painted last week or last

Summation - Archibald

1 month because he couldn't say that. But he said it was
2 consistent with something that was painted two, three, four
3 years ago. That's what testified to, and he said the walls
4 were intact, they were free of blemishes. The floor was
5 intact, the ceiling was intact, the mouldings were intact but
6 for the ones that had the scratches.

7 He said, well, there were two kinds of mouldings,
8 right? Painted mouldings and mouldings that had polyurethane
9 and stain on them. Some of the polyurethane and stained were
10 scratched, others weren't. Some of the mouldings that were
11 painted were scratched and gnawed at. And you saw the pictures
12 and I will show you them again with all the teeth marks, all
13 the claw marks. And he told you what it is. Evidence of pet
14 damage, right? So when the folks in the Department of Health
15 went out and did their inspection, it confirms and it
16 corroborates.

17 Now, wait a minute, the place was in good condition.
18 Remember when I went through that litany with the gentleman:
19 Intact, intact, intact. Everything down the line, intact.
20 Then he gave us a tortured explanation of what fair means.
21 "Condition, fair." Well, fair really kind of, sort of means
22 poor. Remember that tortured discussion? It kind of, sort of
23 means poor and peeling.

24 But that's not what his report said, right? Report
25 said it was in fair condition. And what's of importance here

Summation - Archibald

1 is that every room that they went through, and I could read
2 some of it to you, said, "Radiator is in intact. Base board is
3 intact. Floor board is intact. Ceiling is intact. Everything
4 intact. Fine." Then he said, well, there were violations
5 there, we saw violations, about 23 of them. And again another
6 tortured explanation he tried to give us when I kept asking
7 him, Well, could you please tell me what are the majority of
8 the locations where you testified that came up for violations
9 and he wiggled again a worm that you put salt on and he had to
10 agree it was on the wooden surfaces? And where are the wooden
11 surfaces? The wooden surfaces are the historically preserved
12 mouldings and wainscoting, that's where it was, and on the
13 doors.

14 Does that not make sense and does that not corroborate
15 everything that Mr. Kimpson told Mr. Flynn that is on this flow
16 chart. These are the things. Look what he did. He gutted all
17 the walls. He replaced them with Sheetrock. He primed them
18 and painted them with two coats of non-lead pain. How do we
19 know the paint is not leaded because they outlawed leaded paint
20 30 years ago, you can't buy it, right? So any paint you buy
21 today is lead-free paint, that's what he did. He gutted them.
22 He removed all ceilings, he got rid of them and what did he do?
23 He put up new Sheetrock, primed, painted.

24 And you're going to go down the list. What did he do
25 with the bathroom? Well, for that, he did a gut renovation.

Summation - Archibald

1 He took it all out, he threw it out and he put in a brand new
2 bathroom. New fixtures, you'll see the picture again, new tile
3 floors, new tub, new sink, new ceiling.

4 And remember Ms. Hernandez confirmed that, right? I
5 asked her those same questions. Beautiful brand new kitchen,
6 gutted all of that, threw it out. Brand new kitchen, new
7 appliances. New marble floor, new marble counter top, new
8 kitchen cabinets, new fixtures. New electrical, new plumbing.
9 We asked her. What she said. "Pristine, no issues." No
10 issues.

11 You heard testimony about, well, you know the friction
12 from those hold windows created that dust, the black stuff that
13 you see around the windows, and that could be inhaled or picked
14 up or fall all on toys and create problems. What did Mr.
15 Kimpson do about that? He took them out, gutted those windows,
16 and he put new vinyl windows. New vinyl windows, incapable of
17 he creating that dust. Incapable because you don't paint them.
18 There's vinyl, there's plastic. No need for paint, no issues.
19 That's what he did, replaced the windows.

20 And let's talk about the floor. What did he do with
21 the floor. Did he keep the old flooring? No, he did not. He
22 put down three-quarter-inch plywood followed by
23 three-quarter-inch hardwood floor. That's what he did.
24 Mr. Flynn said, yeah, that's what I saw there. How did you
25 notice? Well, there's a that sliding door. There's a pocket

Summation - Archibald

1 door in that brownstone and you have to leave the space so the
2 door could slide. So, through that opening, you could see the
3 old flooring and you could see the new flooring and everything
4 is fine. That's what he did. So from top to bottom, he took
5 care of this property, right?

6 Then what did he do with the painted mouldings? Where
7 anything was chipping or cracking, he cleaned it off and it was
8 primed and two coats of paint was applied. Our expert, and
9 they didn't provide an expert, so we got to listen to what our
10 expert had to say.

11 Our expert said, Well, under the law, and they can't
12 controvert that and say that's not the law. Under the law
13 there are two methods you could use. The first one you could
14 rip everything out all the way down to the beams. Get rid of
15 everything and start over. You can do that, but the law
16 doesn't mandate that you do that. Or you could encapsulate.
17 You could encapsulate. An encapsulation is the burying of the
18 lead paint. You could bury it under, as we did with the floor
19 with the plywood floor and the hardwood floor. That's proper
20 encapsulation for the floor.

21 You could encapsulate by putting Sheetrock, priming
22 and painting encapsulating any possible lead or lead dust
23 behind that wall. Solid, we did that.

24 Painted surfaces. You can paint them once the paint
25 is not disturbed. It's safe. Nobody but nobody gave testimony

Summation - Archibald

1 to the contrary, did they? There was nothing that the
2 plaintiff could have said, Wait a minute, that's not safe.
3 He's talking about red herrings, let me give a red herrings
4 well, Mr. Kimpson didn't spend a lot of money so he didn't do
5 all of what he -- that's not what the law says. Yes, it's more
6 expensive to rip everything out and start from scratch, but the
7 law doesn't say you have to do that. So you can't hold him to
8 that.

9 You got to hold him to what the law says is
10 permissible. And what's permissible is the encapsulation. So
11 we know now that he encapsulated and we know now that the
12 encapsulation was proper. And you know how it was proper
13 because of what all of the testing came back. The majority of
14 the locations was wooden. And then we heard about again the
15 XRF device, right. What's that all about? It reads through
16 the wall. It reads through the wall.

17 Now, if on the surface of that wall there was any
18 peeling, chipping, bubbling, caulking, cracking different
19 story. Not one person was able to say that. They all said
20 Ms. Cosby, "It was in pristine condition." The plaintiff,
21 "Pristine condition." Folks in the Department of Health,
22 "Intact. Nothing wrong." And this goes back to 2011 and 2012.

23 So we do have a picture after all, don't we. We do
24 have a pick what this place looked like. Ms. Hernandez said,
25 "Everything else was pristine. Everything was new. Everything

Summation - Archibald

1 was great except on some of the wooden mouldings there was
2 chipping a little." So then that prompted me to ask the most
3 obvious question. Okay then, did you make a complaint to
4 Mr. Kimpson so he knew that the paint was chipping? No, I did
5 not. What type of individual was he? He's a good guy. He's a
6 responsive landlord. These are not words coming out of the
7 mouth a defense attorney.

8 These are the words coming out of the mouth of the
9 plaintiff herself. "If there was a problem, I told Mr. Kimpson
10 and he was there and he took care of it." Her words. That's
11 what she said.

12 And he testified and guess what, "I'm there two to
13 three days a week." "Why are you there, Mr. Kimpson?" "I'm
14 there cleaning. I want to see if anybody has any problems. If
15 there's any issues. I take out the garbage." That's what he's
16 doing. That's what he's doing.

17 (Continued on the next page.)

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Summation - Archibald

1 (In open court.)

2 MR. ARCHIBALD: Another red herring that got in there
3 that was a little troubling because they knew better is that
4 well, he paid in cash. He paid in cash. Before you heard my
5 client was -- is a retired police officer that served this city
6 for ten years and was shot in the line of duty and rendered
7 disabled and receives a pension, received disability, received
8 workmen's compensation, and received rental income.

9 Mostly you probably would have thought, hum, well, I
10 wonder where he is getting this money from, right, because they
11 made a big deal about that to give you the false impression
12 that maybe he is doing something illegal. It's not illegal to
13 pay in cash. He could read you a law in any book that says
14 it's illegal to pay in cash. That's not an illegal act.
15 That's appropriate. In America you can pay in cash, if you so
16 choose. That's what he did.

17 Was it cash he was hiding somewhere? No. It was
18 money in his bank account. He told you about his money. He
19 told you about his money. So that's a red herring.

20 You know, maybe he didn't pay people or maybe pay
21 stubs or maybe the taxes. This is not what this case is about.
22 He is not on trial because he doesn't have a pay stub for
23 somebody he paid or he didn't have a receipt. That's not what
24 this case is all about. That's thrown in there to muddy the
25 waters for you to think, hum, remember what he said, this guy

Summation - Archibald

1 is dishonest, this is guy is a liar, this guy doesn't obey the
2 law this guy, goes on and on and on trying to paint a picture
3 of Mr. Kimpson that simply isn't so.

4 But you know the whole story now. So you know, well,
5 wait a minute, maybe if I thought he was starting to do
6 something wrong, maybe if I thought he had illegal money, now I
7 know better. I know where his money is coming from so it's a
8 nonissue. So in your deliberation whether he paid in cash or
9 not is immaterial, immaterial.

10 Now, you've got to ask yourself: Didn't the plaintiff
11 have an equal opportunity to hire an engineer, if they wanted?
12 He kept reminding you -- I'm glad he did -- when this suit
13 started in 2013. Two years ago. They could have hired an
14 engineer. Engineer, go look at the premises first. They
15 didn't do that.

16 They could have hired a lead assessor, like
17 Mr. Morales, and sent him out two or three years ago. They
18 didn't do that; but we did because we wanted to know what was
19 going on. Remember what Mr. Morales said. He said even on the
20 painted surface, on the molding, when I checked, yeah. He said
21 there was lead. He didn't say lead was on the outside. That
22 wasn't his testimony, and you can read his testimony. That's
23 speaking of the lead that's buried, that's encapsulated.

24 And the law says encapsulation is proper. So you
25 can't hold him responsible for doing something that the law

Summation - Archibald

1 says is proper to do. Encapsulation is proper.

2 Then when Mr. Kimpson was finished with all of these
3 renovations, he told you what he did. He cleaned the place
4 thoroughly. It was mopped, it was dusted, it was swept. And
5 that's in keeping with these pictures that you saw in evidence.
6 Right.

7 Take a look at this place. Other than the
8 scratched-up moldings, other than the scratched-up moldings.

9 THE COURT: Would you indicate the number on them.

10 MR. ARCHIBALD: Certainly, your Honor. This one is 04
11 and 06 I'm holding up. Look how beautiful that apartment is.
12 Look at that. It's a place any one of us would want to live
13 in. Ms. Cosby told you how beautiful it was. Mr. Kimpson told
14 you how beautiful it was. Ms. Hernandez told you how beautiful
15 it was.

16 This is the apartment. There has been no change in it
17 other than the scratched-up areas that was repainted, in
18 accordance with what the department of health instructed my
19 client to do. That's it. That's the only difference.

20 Did they bring their client to say, nope, it wasn't
21 like that? No, they didn't. Did they bring any other witness
22 to say, nope, it wasn't like that? My client told you it was
23 like that. And the department of health also told you it was
24 like that. Intact, all walls intact, good condition, fair
25 condition, intact, over and over and over again.

Summation - Archibald

1 So the witness that they felt was going to blow us up
2 actually helped us, and that's why he is Joe Pesci. He is the
3 one that stole the show. He gave us what we needed. Think
4 about it. He gave us this picture that my adversary says we
5 are liking, but we got it, don't we?

6 He is telling us in his report the condition of the
7 place. Room number one: Comment, no windows. Ceiling,
8 radiator and wall, floor, intact. All other walls are intact.
9 Exterior door casing, intact. This is not my witness. This is
10 not somebody that I hired. This is the department of health
11 saying that's the condition on the date that they went out
12 there was August of 2012, when the plaintiff was still living
13 in the apartment.

14 So when he says you don't have a picture, that's far
15 from the truth. This is your picture. This is it, and every
16 room is saying the same thing.

17 And the only places where they found lead were on the
18 moldings primarily, things that were scratched, on a couple of
19 walls, and on those walls their device was reading through.
20 There is no testimony that on the walls it was reading paint
21 that was on the outside of the wall. Nobody testified to that
22 because they can't, because there was new paint on the wall,
23 which cannot possess lead. So then that becomes a nonissue,
24 right.

25 What the else could have -- what else could

Summation - Archibald

1 Mr. Kimpson do? What else could he have done? He took care of
2 his place. He was a responsive landlord. He was there, and
3 that's not just him talking. That's Ms. Hernandez-Adams saying
4 that. That's the kind of guy he was.

5 Now, then we got to get into this whole exposure stuff
6 and how is it that possibly this kid got exposed. There are a
7 variety of ways. Remember, there was testimony from that stand
8 that indicated that, hum, you most -- you could probably get
9 pregnant and while in utero there could be exposure. I think
10 Dr. Troast testified to that, right; and Dr. Troast, yeah, he
11 is a doctor now, but remember when I questioned him on his
12 resume. He was claiming he was a doctor 20 and 30 years ago
13 when he wasn't. Is that something you should consider in
14 determining his credibility, to figure out whether or not what
15 he is saying is worthy of your consideration? I think so.

16 Now, you heard testimony from Ms. Cosby and from
17 Ms. Hernandez-Adams that they lived in another prior, another
18 similar structure, another old brownstone, right, a duplex this
19 time; and they moved because they wanted to be private. But we
20 know she was already pregnant when she was living in that old
21 apartment, right?

22 And remember she testified that her ill-tempered
23 beagle, Russell, used to scratch the walls over there and the
24 doors. We didn't say that. She did.

25 We know buildings built before 1960 has a presumption

Summation - Archibald

1 of lead, right? So was there lead in that apartment? It's
2 quite possible, obviously. When Russell was being ill
3 tempered. So that's one possible area of lead exposure, since
4 Dr. Troast said, yes, it could happen that way. Absolutely
5 could have happened that way at their old apartment.

6 Then you heard her agree and acknowledge that she had
7 a little hobby. She had stripped old furniture, old painted
8 furniture, in the backyard. Remember that? Then I asked her
9 would G.M.M. be out there with you. She said, yeah, he was
10 there. He was there. And you heard testimony that lead is in
11 the soil as well, right. You heard that.

12 Whether it's from old leaded gasoline from cars, dust,
13 we know from the paint, could the baby have picked up lead from
14 that? It's possible, right? Of course when you strip and
15 paint, some of it gets into the atmosphere, some of it gets
16 into the grounds. She was out there doing that with her son.
17 Is that something you need to consider? I would yes to that.

18 Now, the judge is going to tell you all about the
19 burden of proof and what that is. But I'm not going to get
20 into it other than to tell you that as a defendant we have no
21 burden. Right. We don't have to prove anything. They have to
22 prove it.

23 When I say prove it, I don't mean they just have to
24 prove it in a general sense. They brought a lawsuit, and they
25 have four claims in this action, four; and each claim have

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1 elements. So, for example, if claim number one has three
2 elements and they were only able to prove two, then you
3 couldn't find for them because they have to prove three. Other
4 claims have five elements. And the same analysis flows
5 therefrom. So you have to look at each and every element and
6 make a determination as to whether or not they proved all the
7 elements based on the burden that the judge is going to tell
8 you that they have.

9 I dare say when you are ready and when you are
10 finished and you are finished deliberating, there is no way you
11 would be able to say they proved all the elements on all of the
12 crimes -- or all of the charges rather.

13 Now, in making your determination, you are equipped
14 with an arsenal of tools. The judge is going to explain this
15 arsenal. The others just touch on a few, because at the end of
16 the day, it's all about credibility; and you are the only ones
17 that's going to make that determination, but you have some
18 tools to help you.

19 For example, if somebody said yes today and three days
20 later they said no, that's something you need to take into
21 consideration in determining their credibility, because they
22 are being inconsistent. And do they have a reason for being
23 inconsistent? Sometimes they do. It could be bias why they
24 are being inconsistent. Why they are being inconsistent, it
25 could be prejudice. Why they are being inconsistent, it could

Summation - Archibald

1 be because they didn't have an opportunity to evaluate all the
2 information. That's a reason why they could be inconsistent.
3 That's something you need to think about.

4 The law permits you to do what we call draw
5 inferences, logical inferences, logical inferences that you
6 need to draw. For example, if tonight you went to bed and it
7 was dry outside and in the morning you wake up and the cars are
8 wet, the streets are wet, the trees are wet, but you didn't see
9 it rain, it's a logical inference to draw that it rained last
10 night while you were asleep. That's logical, and you could do
11 that. You could draw those logical inferences, and I am asking
12 you to draw those inferences from the evidence.

13 Now, you heard testimony from Mrs. Hernandez-Adams,
14 and she says, you know, Russell, our ill-tempered beagle, he
15 only scratched the door. He scratched no place else. But you
16 remember the old apartment? She testified he scratched the
17 door and he scratched the walls. Isn't it logical a dog like
18 Russell could have had emotional problems? That's a hunting
19 dog. Those beagles are bred for hunting, and she acknowledged
20 that. She didn't acknowledge some of the other
21 characteristics, but she acknowledged that one. Right. That's
22 a hunting dog.

23 Do you think in the new apartment, my client's
24 property, that he wouldn't have scratched and gnawed his way in
25 other places too? A logical inference.

Summation - Archibald

1 Then we get to how Russell acted towards this young
2 fellow, G.M.M. The mother said, well, one day Russell was
3 asleep or laying down and G.M.M. jumped on his back, and he
4 instinctively turned around and bit him, and he bit him on his
5 lips and his mouth and he had to get stitches. Okay. That
6 shows some degree of ill temperament.

7 But then in the records, their records from their
8 doctor, there is a bite on the arm that she took him to the
9 doctor for. Should we then conclude that he was bitten twice
10 by this animal? I would say yes. Because she testified with
11 clarity in respect of the bite on the face and the mouth, with
12 clarity. She didn't say, well, it could have been someplace
13 else maybe. No, on his mouth. He had to go get stitches.
14 Tell me about what kind of animal is that?

15 And thereafter, remember she said the dog has to wear
16 a muzzle now in their home. A muzzle, all the time, because he
17 is attacking the -- their own family members.

18 Now, the whole thing about her pregnancy and the
19 hydrocodone use as well as the general anesthesia, you
20 certainly need to think about that. Right? Now, think about
21 her testimony. When she had the surgery she didn't know she
22 was pregnant. Now, use your common sense. When you are going
23 to go have a surgery, anyplace, there are certain preoperative
24 procedures. They are going to test your blood. If you are a
25 woman of child-bearing age they are going to see if you are

1 pregnant.

2 She knew she was trying to get pregnant. Right. So
3 what's the possibility that she was pregnant? She said, we
4 were trying for two years, we were trying to get pregnant, and,
5 boom, we got pregnant with G.M.M. She is an educated woman.
6 She has a master's degree. It's not someone who is uneducated.
7 Would you want to subject your unborn child to anesthesia? She
8 says, well, the doctor didn't know either, and we went ahead
9 with the surgery. How credible is that?

10 And then she didn't find out she was pregnant. She
11 said two, maybe three months later she found she was pregnant.
12 And I asked her, well, what about your menstrual? Well, I have
13 irregular menstrual my entire life. Okay. I grant her that.
14 Any symptoms of pregnancy? No, no symptoms. So she was
15 pregnant for three or four months with no symptoms.

16 And the most incredulous part of her testimony on this
17 topic was, well, when I went to my physical therapist, he poked
18 at my stomach and asked me if I was gaining weight and just out
19 of curiosity I took a pregnancy test. That's when I learned I
20 was pregnant. Hum. Does that make you want to scratch your
21 head and twitch your eye and wonder if something is wrong with
22 this picture? It should, because that doesn't make any sense.

23 The only logical explanation that she knew she was
24 pregnant and went ahead and did the surgery regardless,
25 exposing her unborn fetus to anesthesia.

Summation - Archibald

1 Then she took hydrocodone, an opiate. Opiates are
2 very powerful narcotics, and they have the same propensity to
3 cause neurological deficits in newborns if taken in the first
4 trimester. You heard the experts testify what was going on in
5 the first trimester. That's when the nervous system is being
6 formed, the brain, all the functioning is taking place; and if
7 you disrupt that, yes, it could have long-term complications.
8 But she took it anyway. She couldn't tell us how long she took
9 it for except, she said, well, maybe a few days; but she
10 couldn't tell us the dosage. That's important. It comes in
11 different strengths. She couldn't tell us whether it was a
12 pill or whether it was a capsule. Is that something you should
13 consider in evaluating anything that she is saying to you? I
14 think so.

15 Then she spoke about all of the falls this young man
16 had. The first one was here in Brooklyn. What was he doing?
17 In the backyard, soil, climbing on a fence. He fell, busted up
18 his lip, busted up his teeth, had to go to the hospital. Lots
19 of bleeding. She was concerned.

20 Then they go to Dallas. Testimony is the following:
21 Yeah, he had several falls, he was always crashing; and she
22 used a term that I never heard before but I know what it means
23 now. She said he face planted on our deck. Face planted. How
24 many times he did that? I don't know how many times, but it
25 was quite a few times. He had a lot of crashes. These are the

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1 types of things this young man was exposed to.

2 Now, let's look at the experts now. All right. We
3 have already established, in my view, that based on the
4 evidence here my client didn't do anything wrong. He did what
5 he was supposed to do. He encapsulated, and the expert said it
6 was proper. Nobody said it was wrong. Nobody. It was proper.
7 The dog or dogs disturbed the properly's encapsulated paint and
8 released it into the atmosphere.

9 My client had no reason whatsoever to know that the
10 place was being chewed up like that until the clients moved out
11 and there was an issue with lead in G.M.M.'s blood. And when
12 he found out, he went into action immediately. And that's
13 confirmed. That's confirmed by Ms. Hernandez-Adams. Yes,
14 immediately he took care of it. He came in, he tried, he did
15 this, he had a company. That's the kind of landlord he was.

16 So do you think if Ms. Hernandez-Adams had said to
17 Mr. Kimpson, look, Mr. Kimpson, there is a chip here, could you
18 fix it, do you think he wouldn't have fixed it? And she did
19 testify, no, I didn't tell him. I didn't tell him.

20 So if he did the encapsulation appropriately,
21 according to the experts, he did it appropriately, what else
22 could Mr. Kimpson have done? What else could he have done? He
23 did what he was supposed to do. Then counsel said, well, it's
24 illegal to have paint, lead paint, in there. That's not true.
25 That's not what the law says. The law says it's got to be

Summation - Archibald

1 safely encapsulated, and we have the testimony that it was
2 encapsulated. That's what the law says. There is no evidence
3 to the contrary, that he didn't safely encapsulate the paint.

4 All the evidence points to him safely encapsulating
5 the paint. Let me tell you why you know that. You know that
6 because when the good folks from the department of health went
7 there, every single surface of that, 86 or so, would have some
8 up with lead paint. That would make sense, if he didn't do it.
9 But instead, it was on the moldings. The comments keep saying
10 all upper walls are intact, all ceilings are intact. No
11 issues. The walls, the ceilings, intact, no problem
12 whatsoever. So it stands to reason that the encapsulation was
13 properly done and was disturbed by plaintiffs' dogs.

14 Then we had our good friend Mr. Strulovitch. Yeah, he
15 tested for lead. He had the wipes and he wiped and he put it
16 in a bag and he sent it away. When did he do that test?
17 Around the same time that the city came in and did their test.
18 So you don't need to be a brain surgeon to figure out, well, if
19 the dogs are scratching and there is dust in the paint and
20 there was lead paint chips in the place, that if you came and
21 you tested for lead dust he would find it. Does that make
22 sense? Sure. Absolutely.

23 Does that mean, though, that Mr. Kimpson is
24 responsible for that? No, he is not. And the judge will tell
25 you that. He is not responsible if you determine that the

Summation - Archibald

1 level of renovations that he did was adequate under the
2 circumstances. Mr. Flynn tells you that it was.

3 And if the city, when they came in and it wasn't
4 adequate, they would have said, well, problem, problem, you
5 need to do. They didn't do that, right? So that's something
6 you need to take into consideration.

7 Let me change pace a little and tell you a little bit
8 about these claims. There are four of them. The first one is
9 a violation of New York City Childhood Lead Poisoning Act.
10 That's their first claim.

11 This first claim they have to prove, based on the
12 standard the judge gives you, these two elements. But I'm only
13 going to tell you the second element. The second element says
14 that the defendant did not take reasonable steps to remedy the
15 hazardous lead condition. Then at the end of that paragraph,
16 it says the following: Complete gut or other adequate
17 renovation of the building unit is also considered reasonable.
18 That's all he has to do, and they are going to have to prove
19 that what he didn't wasn't reasonable, that he didn't
20 reasonably do the renovation.

21 I will repeat. Complete gut or other adequate
22 renovation of the building unit is also considered reasonable.
23 Here it is, ladies and gentlemen. This is what he did. This
24 is reasonable.

25 It goes on to say: The key question you must answer

Summation - Archibald

1 is, under the city statute, did the defendant take reasonable
2 steps to abate any lead-based paint hazard? Was he reasonable?
3 Did he take reasonable steps? It goes on to tell you about the
4 third element.

5 To prove damages, the plaintiff have the burden of
6 proving that the child plaintiff suffered an injury and that
7 injury would not have occurred without the wrongful conduct or
8 omission of the defendant. In our view, there is no wrongful
9 conduct or omission. He did what he was supposed to do. So
10 they are not going to be able to meet this element. Therefore,
11 you can't find against them. You can't find liability against
12 my client based on that.

13 The second one is the Federal Residential Lead Based
14 Hazard Reduction Act. That's the second claim. This one has
15 one, two, three -- four elements. I'm reading you from the
16 fourth element. In order to prevail on this claim, the
17 plaintiff mother must establish that the defendant knew that
18 there was lead-based paint or lead-based paint hazards on the
19 property and failed to disclose them to her.

20 In considering whether the defendant provided false
21 assurances to the plaintiff, you must reflect on the fact that
22 the defendant does not, does not, have a positive obligation to
23 conduct any evaluation of the property or lead abatement
24 activities under this statute. So when my adversary is jumping
25 up and down and screaming that he knew, he didn't know, he

Summation - Archibald

1 didn't conduct an investigation, he didn't do this, this is the
2 law. He doesn't have to. Claim number two then evaporates.
3 Right? He can't prove that. He didn't prove it.

4 Negligence, claim number three. I will go down to the
5 second element. You need to show to find him negligent that
6 the defendant failed to remedy the hazardous lead condition,
7 that he failed to remedy it. Here is your chart again, ladies
8 and gentlemen. He remedied it. He did everything that he was
9 supposed to do. He remedied it.

10 And how do we know that? Mr. Flynn, the professional
11 engineer, came by and said this is what was done and it's
12 appropriate. It's lead-safe renovation. Remember that term,
13 lead-safe. It doesn't have to be lead-free. The plaintiff
14 wants you to believe that it needs to be lead-free, but it does
15 not. That's not what the law says. Lead-safe. And
16 encapsulation equals lead-safe.

17 (Continued on the next page.)

18 o o o

19 Certified to be a true and accurate transcript.

20 /s/ Michele Nardone

21 MICHELE NARDONE, CSR, RPR, CRR -- Official Court Reporter

22

23

24

25

MICHELE NARDONE, CSR, RPR, CRR -- Official Court Reporter

Summation – Archibald

1 MR. ARCHIBALD: Finally, the fourth way. On the New
2 York Real Property Law Section 235(b). This one, they have two
3 elements. The first element is that first, they said the
4 landlord had notice of a condition that's dangerous to the
5 plaintiff and that he didn't -- I'll read it for you. It says,
6 "Defendant was not required to ensure that the premises were
7 perfect, but he was under an obligation to ensure that no
8 conditions were present that would materially affect the lives
9 and safety and health of the tenant."

10 By doing his lead-safe renovation -- now, the
11 plaintiff is trying to say, well, he didn't know lead was a
12 problem. He didn't know he had lead. He testified he didn't
13 know about lead. That's immaterial. You know why? Because
14 the expert came forward and testified that and said, look, the
15 renovations that was done is lead-safe. That's it. So the
16 fact as to Mr. Kimpson's knowledge or when he knew it?
17 Immaterial. The renovation was lead-safe.

18 Now, we could talk about their witnesses. They put on
19 for you Dr. Gordon, who had the benefit, unlike anybody else in
20 the case, to interview and evaluate this young man on two
21 occasions, approximately a year apart. So he had two
22 opportunities to get it right.

23 And you heard him. He had to agree with me that his
24 evaluation and his conclusions then lacked intellectual rigor
25 because he didn't take all of these things into consideration.

LISA SCHMID, CCR, RMR

Summation - Archibald

1 First of all, he had no idea that Ms. Hernandez Adams had
2 surgery under anesthesia or was on hydrocodone. He didn't know
3 that. But he found that out between examination number one and
4 examination number two. He testified that's when he found out.
5 He didn't take that into consideration.

6 He didn't take bilirubin into consideration. He
7 didn't take the cephalohematoma into consideration. He didn't
8 take the otitis media into consideration. He didn't take the
9 lack of proper vaccination into consideration. He took none of
10 that into consideration. What kind of an expert is that that
11 leaves out all of these possible other contributing factors of
12 causes?

13 But he was very careful when he did his dissertation.
14 Remember when I spoke to him about the dissertation and the
15 things that you need to do to put forth a proper dissertation?
16 You would look at potential reasons, causes, causality factors
17 and you would synthesize all of that into an original product
18 of your own -- which he did for his dissertation.

19 And part of what you've got to consider is, hum, when
20 the doctor is doing work that's not litigation related, he was
21 very careful and proper with what he did, but because he's
22 doing this litigation type evaluation, he's ignoring a lot of
23 important information. That definitely should be considered by
24 you, because his report lacked the intellectual rigor
25 necessary.

Summation - Archibald

1 Then he took a leap of faith, and he thought we
2 weren't going to uncover it in his final diagnosis. Remember
3 that? ADHD is his diagnosis. Attention Deficit Hyperactivity
4 Disorder. That's characterized by certain times of
5 symptomology and behaviors and what have you.

6 And we've all heard of the authoritative book that
7 gives you the right to call a diagnosis in the area of mental
8 health. And we know what's necessary. Six out of nine. Six
9 out of nine symptoms, you have to see before you can say
10 somebody has a particular disorder. Six out of nine.

11 He had to agree with me, though, because he knew we
12 knew what was in that authoritative manual. So he had to say,
13 yes, you have to have six of nine, because had he said no, then
14 I would have confronted him with the authoritative manual, and
15 he would have had a problem. Again, salt on a worm. Right?
16 He would have had to wiggle.

17 So then he would have to say, you know what? I saw
18 six, but I only put four. Why is that, Doctor? Well, I had --
19 I saw them, but I just didn't put them. Well, wouldn't that be
20 something that you would need to put in there? Yes, I agree.
21 That is important, right? Because you're making a diagnosis
22 which would require certain types of treatment modalities. So
23 if you're going to make that type of a diagnosis, you'd better
24 be in a position to defend it. And he couldn't. Did he? He
25 couldn't. He couldn't.

Summation - Archibald

1 So does this child have AH -- no. I'm confusing.

2 Attention Deficit Hyperactivity Disorder. I always confuse
3 that acronym. Does he have that? No, he doesn't.

4 According to Dr. Auciello -- Dr. Auciello was
5 vigorously cross-examined. He didn't come off of his position.
6 He had the authority, right? He was able to demonstrate why
7 this child doesn't have that disorder. Dr. Gordon wasn't to
8 able to that, and he had two bites at the apple and he missed
9 it both times.

10 Dr. Auciello says, well, he has some of this and some
11 that, but none to give us a specific diagnosis. Yeah, he's a
12 child that has some, you know, probably developmental delays,
13 but that's part of the human life experience. You heard that
14 testimony. Yeah, he's low average, but he's not clinical.
15 He's subclinical. You heard that testimony.

16 So the testimony of Dr. Gordon is just there to try
17 and boost whatever damages they think they would be entitled
18 to, but Dr. Auciello was able to clearly show that that is
19 erroneous -- erroneous.

20 And again, Dr. Gordon had to admit, yes, I agree.
21 Coming up with this diagnosis without putting all six, that
22 lacked intellectual rigor, but it's in there and you should
23 trust me because I'm telling you I saw it. I just didn't put
24 it in there. I know I should have put it in there, but it's
25 not in there. That's Dr. Gordon. Should he be credited with

Summation - Archibald

1 what he did? I don't think so. I don't think so.

2 We've already talked about Dr. Troast. He's a
3 nonentity. I'm not even going to waste any more time on
4 Dr. Troast, but let's talk about the bow-tie wearing Dr.
5 Tinari.

6 Dr. Tinari, the forensic economist that did the number
7 crunching for us -- and he had an opportunity to correct his
8 number crunching. Remember? He had a nice edition. Put it up
9 on the screen, was all fancy and explaining. He had his
10 pointer out and the whole nine yards.

11 But he still got it wrong, just like Dr. Gordon. This
12 was his second opportunity, because he wanted his figures to be
13 accurate for trial, so he redid them. Still got them wrong.
14 He still screwed it up. Right? He still used inappropriate
15 assumptions. He didn't consider the things that he needed to
16 consider. I'm not going to get into the specifics, because it
17 got a little technical in terms of the things you look at, the
18 things you look to, the things you rely on in making your
19 assumptions.

20 Well, let me tell you his fatal error. His fatal
21 error was he relied on Dr. Reagles. I asked him 15, 20
22 questions about where did you get that from? Where did you
23 make that assumption from? Oh, Dr. Reagles. Dr. Reagles.
24 Dr. Reagles. Dr. Reagles. So he took everything from
25 Dr. Reagles.

Summation - Archibald

1 And we saw how Dr. Reagles wiggled like a worm also,
2 didn't he? When I hit him with the Spizman article, based upon
3 what he said Spizman said, then he would have to come back and
4 change his mind again. He didn't think we would read the
5 Spizman article. I'm sure he was of the view that, hey, if I
6 put it in my report, that's it. It's as good as gold. That's
7 not how it's done.

8 Everything he cited in his report, we researched it.
9 That's what you're supposed to do. We researched everything.
10 And when he realized that he was exposed, he had to distance
11 himself from Spizman. He walked away from Spizman, because
12 Spizman didn't say what he said Spizman said. He walked away
13 from it.

14 And he said, well, you know, that's an old article,
15 and there are more recent. Old nothing. The Spizman report
16 was published in 2013. And the assumptions he was making
17 couldn't be supported by the sources that he cited. That is
18 intellectual dishonesty.

19 He couldn't support it, so he had to back away from
20 it. And you need to think about in determining whether or not
21 to give any credit to anything Dr. Reagles had to say and of
22 course, by extension, Dr. Tinari. Think about it. Tinari
23 based his assumptions exclusively on the assumptions made by
24 Dr. Reagles.

25 And in end -- in the end, Dr. Reagles had to admit

Summation - Archibald

1 that he was no more accurate than a weatherman. That was it.
2 He was no more accurate than a weatherman. So any assumptions
3 that he had in there, you now how the weather goes. I'm going
4 to leave that to your deliberation.

5 We then heard from Ms. Cogan, the lab manager. And
6 the lab manager, she testified to procedure and policy and ray
7 and ray and ray. She spoke very fast. It was difficult to
8 follow her. But thank God we have a very good stenographers.
9 They got everything she said. So if you need to read anything
10 Ms. Cogan said, you can read it. It's in there.

11 But the long and short of what she had to say was
12 following. We're a lab. We do testing. We have records of
13 the people. We do calibration. We do this. But at the end of
14 day, you know what? She couldn't tell you if the test was done
15 appropriately, right? She couldn't tell you that. Why? She
16 wasn't there.

17 I'm not sure how valuable that is to you. She could
18 just say, well, I'm the manager of the lab. We did this step,
19 this step. We use this machine, that machine. Okay. What
20 does that have to do with the test that was performed on this
21 particular day?

22 Now, she did testify though that VM -- I'm not going
23 to try to pronounce VM's name -- but she said and you can read
24 it, was with her for a long time and is still an employee. Why
25 not produce VM, right? Let VM take the stand and tell us what

Summation - Archibald

1 he did. You've got to determine why they didn't produce VM.
2 Why not produce the person that did the test? No VM. So we
3 have to take her word that VM did the test on the day in
4 particular the correct way. Hum, that's kind of dubious,
5 wouldn't you agree? VM is still an employee.

6 Now, there's one person that we haven't really talked
7 about yet in terms of physical being, and that's Geronimo.
8 Wouldn't it make sense, ladies and gentlemen, for you to have
9 seen Geronimo?

10 This court is probably once of the most technological
11 courts in the city. We could do video conferencing. We could
12 have seen Geronimo on television with his parents if they
13 didn't want to bring him here, right? They chose not to. They
14 showed you a picture of him.

15 In coming up with your analysis, wouldn't you want to
16 see, they say he's hyperactivity. He has this problem, that
17 problem the other problem. If he was in court for the two or
18 the three hours, however long they keep him in here, you would
19 have an opportunity to observe him. Maybe he'd be sitting
20 there. Maybe he's sitting there. I don't know where they'd
21 put him to sit.

22 Wouldn't that be something you would want to see?
23 Wouldn't you want to see this young man that we keep talking
24 about? They chose not to bring him to court. Okay? So then
25 they're depriving you of the opportunity to make a complete

Summation - Archibald

1 assessment.

2 Remember the Michael Jordan flew game I told you about
3 earlier? It's similar to that, right? You're going to have
4 make a decision without knowing all of the facts. Is that what
5 you want to do as a juror to make a decision? But they're
6 depriving you of that. You need to ask yourself why. You need
7 to ask yourself why.

8 But Dr. Auciello told you, based on his scores, yeah,
9 he's low average. But that's what they call human variability,
10 right? Everybody develops at different stages. Everybody have
11 a different intelligent quotient. We all can't be nuclear
12 physicists. Based on his testing that he had, he's in that low
13 average range. Does that mean normal? Yeah, normal but low
14 average. Subclinical. There's nothing clinically wrong in
15 that aspect. Yeah, he's a little slower. That's it.

16 So ladies and gentlemen, I think there's enough meat
17 here for you to make the only decision that the evidence
18 supports -- not the emotionalism. We don't need any of that --
19 the evidence or lack thereof. Right? Lack thereof. And
20 there's a lack of a lot of evidence here.

21 And you can't guess. You can't speculate. You have
22 to have evidence, and there's no evidence here that number one,
23 my client did anything wrong because he encapsulated.
24 Everybody said the place was in great condition, even their own
25 client said so.

Summation - Archibald

1 The folks on the Board of Health came out. And where
2 did they say problems were? Everybody saw this. Right? This
3 is the apartment. This is the beautiful brownstone,
4 beautifully renovated. This is what it looked like before.
5 You saw these pictures.

6 Based upon the testimony, you probably say that must
7 be some kind of a dump right? Some kind of a slob, with paint
8 peeling off the wall, the place falling apart. You have no
9 idea you'd see pictures like this. But these pictures are
10 confirmed by everybody else. That's the condition the place
11 was in.

12 So he did what he was supposed to do. And nobody ever
13 complained to him and we know that because Ms. Hernandez Adams
14 says so. What else could he have done to be reasonable? That
15 was reasonable. That's lead-safe. Reasonable. And that's all
16 the law says he has to be is reasonable. And this is
17 absolutely reasonable. That's what he did.

18 So he has no liability here. I'm not going to go over
19 again all of the experts and what they came up with and the
20 numbers and why their numbers are off, but they're off, first
21 of all, and you saw why they are off, because they used the
22 wrong assumptions.

23 I just want to say thank you so much for the past two
24 weeks, for listening to all of what we had to say, and I hope
25 when you start your deliberations, you come back at the end of

G.M.M. v. Kimpson

1 the day with a right decision, which is no liability on
2 Mr. Kimpson, because under the law, what he did was reasonable.
3 I thank you for your time and attention.

4 THE COURT: Thank you.

5 Why don't you take a break, about five minutes. I'm
6 not going to be able to charge you tonight. The charge is just
7 too long. So we'll have a brief rebuttal, and then I'll allow
8 you to go home. So take 15, please. Don't discuss the case.

9 (Jury exits.)

10 THE COURT: Applications?

11 MR. FRANKEL: I'm sorry, Judge, no, not by plaintiff.

12 THE COURT: All right. Fifteen minutes, and we'll
13 charge in the morning. It's just too long.

14 MR. FRANKEL: That makes sense. I'll be very quick,
15 and that's it.

16 THE COURT: Well, you take what you need.

17 MR. FRANKEL: Thank you, Judge.

18 THE COURT: I'm not going to cut you off.

19 (Recess.)

20 (In open court, outside the presence of the jury.)

21 THE COURT: Sit down, please. It's my impression that
22 Vladimir, who is the man who actually did testing was not
23 available.

24 MR. FRANKEL: No, that's what she said. I thought --

25 MR. ARCHIBALD: That's not what she said.

LISA SCHMID, CCR, RMR

G.M.M. v. Kimpson

1 THE COURT: I looked at the record it's not on the
2 record. I'm just looking through the record. That was my
3 assumption.

4 MR. FRANKEL: I know that she said that he doesn't
5 know the procedures that she had to explain to the Court how
6 it's done, where it comes from. He just sits in the lab.

7 THE COURT: Well, I'll not reopening case. I think
8 the argument was a valid argument that defendant made. He's
9 the one that did it, and why didn't they bring him in? But I
10 was under the clear impression that you had tried to get him
11 and he didn't come in. Otherwise, why would you not?

12 MR. FRANKEL: We asked and they said no one was coming
13 until we got your order, but the only person we could speak
14 with was her and we didn't know if he was even there. So to
15 get your order with his name and they say, oh, too bad. He's
16 not here. We figured we have to come get someone in here and
17 she's the boss.

18 THE COURT: Well, did you try to get him in?

19 MR. FRANKEL: Yes, we did.

20 THE COURT: Who did you ask?

21 MR. FRANKEL: We asked her. We spoke with her -- Mr.
22 Cantor -- two or three times and she said no one's coming. We
23 had sent the subpoena.

24 THE COURT: You tried to get --

25 MR. FRANKEL: Yes, we did. We asked her to bring him

LISA SCHMID, CCR, RMR

Rebuttal - Frankel

1 with her.

2 THE COURT: We don't have a record of it.

3 MR. FRANKEL: Okay.

4 THE COURT: But that was my assumption. I couldn't
5 believe you would bring in somebody when the person we wanted
6 was clearly under the cases when he had personally did the
7 test. I mean, that's why I got involved in it -- excessively,
8 possibly.

9 Well, I'm not going to reopen the case. That's -- the
10 case is what it is. Bring in the jury.

11 MR. ARCHIBALD: Your Honor, while we're waiting on the
12 jury, if I may.

13 THE COURT: What?

14 MR. ARCHIBALD: While we're waiting -- I'm
15 tongue-tied. While we are waiting for the jury, if I may, we
16 have the same issue as it relates to the Department of Health.
17 The person who did the test --

18 THE COURT: The person is on vacation. I think that's
19 clear on the record.

20 MR. ARCHIBALD: Yes, that's clear.

21 THE COURT: I understand.

22 (Jury enters.)

23 THE COURT: Proceed.

24 MR. FRANKEL: Thank you, Judge.

25 Thank you, again. Another long day, but this is it.

Rebuttal - Frankel

1 Just a few minutes, that's all I'm allotted and so, anything
2 that you've heard that I don't answer now, it's for you to talk
3 about and decide what you have heard. If you think perhaps
4 there's another issue, then the record is here. The evidence
5 is here.

6 But I will say, as I am not surprised and I don't
7 think you are either, there are now three new distractions or
8 red hearings that you have learned about in the summation.

9 One, Dr. Rachel Frank is incompetent. She didn't keep
10 the right records. She's didn't do the right follow-ups. So
11 all of the witnesses who testified for the defendant who never
12 met the child, never had anything to do with him clinically and
13 saw all the records that showed everywhere else there was no
14 problem, that doesn't count because she's a terrible record
15 keeper and therefore, basically, the argument is, don't believe
16 her. She was incompetent, as well. So that's one of the new
17 three.

18 The second one is the parents are bad parents now,
19 because they didn't take the little boy to the program. As the
20 mother explained, we don't have the money. The insurance
21 doesn't cover it. We didn't get it yet. As soon as my
22 husband's new job insurance kicks in, we're going to get every
23 program we possibly can. If you think that she was not a good
24 mother and is not trying hard, that's for you to decide. But
25 that's number two.

Rebuttal - Frankel

1 And number three, why didn't we as plaintiffs, hire an
2 engineer in 2013, if we wanted to check and see? That's just
3 ridiculous, among other things. What right do we have to go
4 into the apartment to do anything? But secondly, there were
5 three positive lead reports from the contemporary time in 2012.
6 They would have liked us to do that because who knows what he
7 did between the time the Mendez family left and the time in
8 2015, which is all that you hear from Mr. Archibald?

9 And I keep asking you -- and I apologize again, keep
10 in mind there was no remediation. He didn't know about lead.
11 He didn't talk to his street contractor Randy whoever about
12 lead. He knew nothing about remediating lead. He knew nothing
13 about encapsulation. You heard 20 times. He encapsulated. He
14 encapsulated. There is no one shred of evidence he did any of
15 that. In 2015, his witnesses testified when they went to the
16 apartment, it was correctly encapsulated with all the proper
17 things that should have been done. So again, is that the way
18 it was in 2012, when this kid, this child, this infant got
19 poisoned?

20 And something that struck me while Mr. Archibald was
21 providing his summation. There were three tests done by three
22 different agencies. Now, one was just the wipes, so that's on
23 the floor, where they found lead in seven out 14 places, so
24 it's not behind the wall and consistent with their witness,
25 Mr. Morales. I said that already. Don't need to beat a dead

Rebuttal - Frankel

1 horse.

2 But try to find in any of the three reports or any
3 place in records where Mr. Kimpson once told anyone this
4 apartment is messed up because the dogs scratched and created
5 lead and that's what happened and that's why it happened.

6 And the City came, and you read the report, it has
7 attachments with letters saying if you don't do it by this
8 time, you have to do this by then. We're going to -- they
9 could fine you. They could do all sorts of things.

10 Never did he at least say, look, I'll do the best I
11 can, but it's not my fault. They had these crazy wild dogs
12 that were scratching everything up. And those are the people,
13 the tenants and they're out of here now -- I'll do what I'm
14 supposed to do, but don't be so hard on me. Not even a mention
15 of that anywhere, not once anywhere in the record.

16 Now, don't you think that would be --

17 THE COURT: Go ahead.

18 MR. FRANKEL: And the second part about still all the
19 lead behind the walls only, that's not the evidence. The
20 evidence is, among other things, which is frightening, and
21 which is why I asked you to think about what this man is really
22 made of, is that in 2015, Mr. Morales, his lead contractor,
23 searching for lead, found lead still inside the moldings and
24 outside the walls -- not behind walls -- after a woman had
25 lived there and had a baby who also lived there.

LISA SCHMID, CCR, RMR

Rebuttal - Frankel

1 MR. ARCHIBALD: That's not the testimony, Your Honor.
2 That's not what Mr. Morales testified to, that he found paint
3 out -- lead paint on the outside of the walls. That was not
4 his testimony. He testified --

5 THE COURT: Well, the jury will recollect --

6 MR. FRANKEL: Was not behind any walls.

7 THE COURT: Excuse me.

8 MR. FRANKEL: I'm sorry. I thought you finished.

9 THE COURT: I won't rule on it at the moment. If
10 there is any question about it, the jury will ask for the
11 transcript.

12 MR. ARCHIBALD: Fair enough, Your Honor.

13 MR. FRANKEL: Please do, if you have any question
14 about what Mr. Morales said about the molding, which is outside
15 the wall.

16 But here's another question. When you look at the
17 City's -- this again is 0-3 and 0-5. When you look at the
18 City's report where they talk about fair condition, fair
19 condition -- now, don't you think perhaps that if the inspector
20 from the City came in and saw these pictures in 2012,
21 somewhere, it wouldn't be fair condition?

22 This happened in 2015, ladies and gentlemen, because
23 if it was in 2012, the City would have remarked. He would have
24 told them, look at what these dogs did. He didn't tell them.
25 The City didn't note it. The other report doesn't show it.

Rebuttal - Frankel

1 And they're asking you now to accept his good faith
2 because he did everything to encapsulate, not knowing anything
3 about lead, not knowing anything to talk to the -- his street
4 builder about. He just luckily say somehow did that. Find
5 something in the record that shows you that that man did
6 anything in 2011, when the demolition and construction
7 happened, before our clients, before the Mendez family moved
8 in. You won't find a single note, piece of paper, witness.

9 He has friends. He has relatives. Nobody testified
10 that in 2012, they went to the apartment and as soon as they
11 went there, this is what they found. Nobody. Not a friend,
12 not a neighbor, not a relative. Does that make sense?

13 Lastly, I don't want to take any more of your time,
14 the last distraction was Mr. Archibald saying to you, well,
15 remember, he didn't qualify in Dallas. He took was test. The
16 test, he was subclinical. That means he was not that serious.
17 He couldn't qualify for some of the programs that they have
18 there. This little boy --

19 MR. ARCHIBALD: Your Honor, this is going beyond his
20 ten minute rebuttal, Your Honor.

21 THE COURT: I didn't cut you off, sir. I'm going to
22 allow some leeway.

23 MR. ARCHIBALD: Okay, Your Honor.

24 THE COURT: Thank you.

25 MR. FRANKEL: He called it subclinical based upon the

LISA SCHMID, CCR, RMR

1 Rebuttal - Frankel

2 testing in Dallas. This little boy, who is four years old in a
3 couple weeks, has significant cognitive deficits, undisputed,
4 serious antisocial behavior issues now, and permanent brain
damage. Subclinical.

5 Thank you. Thank you very much, ladies and gentlemen.

6 THE COURT: Would you be here at ten o'clock tomorrow?
7 I caution you again don't discuss the case. Don't do any
8 search. Thanks very much.

9 (Jury exits.)

10 THE COURT: Any applications?

11 MR. FRANKEL: No application, Your Honor.

12 MR. ARCHIBALD: Your Honor, my applications are
13 already in the record. I have no additional applications under
14 the circumstances.

15 THE COURT: Thank you. All right. Good night,
16 everybody.

17 I want to say that I appreciated the professional way
18 that the attorneys presented the case. Good night.

19 MR. FRANKEL: Thank you, Your Honor, for your
20 patience, as well. Thank you.

21 MR. ARCHIBALD: And you want the attorneys here at
22 what time tomorrow, Your Honor?

23 MR. FRANKEL: Quarter to ten?

24 THE COURT: Why don't you get here about quarter to
25 ten, just in case there's something that occurred for you all.

LISA SCHMID, CCR, RMR

G.M.M. v. Kimpson

1 I'll be loathe to change the charge, since the summations were
2 based on the agreement the charge was satisfactory.

3 MR. ARCHIBALD: Your Honor, would you be issuing a
4 formal written order or judgment in respect of my motions that
5 was made and briefs that I filed in the case?

6 THE COURT: On what issue.

7 MR. ARCHIBALD: Well, on the punitive damages issue,
8 as well as the admissibility of those records, the Enviro-Pro
9 issue.

10 THE COURT: No. At this moment, I'm not inclined to
11 go further than I have orally, but I'll consider your
12 application.

13 MR. ARCHIBALD: Okay. Thank you Your Honor.

14 THE COURT: Good night. I expect the attorneys to get
15 a full list of witnesses available and a full list of exhibits,
16 so we can send them in.

17 MR. ARCHIBALD: That's fine, Your Honor.

18 (Trial adjourned to Friday, July 10th, 2015, at
19 10:00 a.m.)

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G.M.M. v. Kimpson

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I N D E X

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Kincaid - Direct/Archibald 1183

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Kincaid - Cross/Frankel 1213

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Kincaid - Redirect/Archibald 1229

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Summation - Frankel 1244

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Summation - Archibald 1304

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Rebuttal - Frankel 1350

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